TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED JUNE 11, 1914.

(24,268)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1915.

a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit Begun and Held at the Court House, in the City of Richmond, on the First Tuesday in May, Being the Fifth Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Hon. Martin A. Knapp, Circuit Judge.
Hon. Charles A. Woods, Circuit Judge.
Hon. Alston G. Dayton, District Judge.

Among other were the following proceedings, to-wit:

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-Defendant in Error,

versus

UNITED STATES to Use of J. A. PEELER et al., Trading as Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company; E. J. Erbelding, and Holley & Dyches, Defendants in Error and Cross-Plaintiffs in Error.

On Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia.

Be it remembered that heretofore, to-wit: on January 9, 1914, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

1 *Transcript of Record.*

Filed Jan. 19, 1914.

THE UNITED STATES OF AMERICA,
Eastern District of South Carolina, To wit:

In the District Court.

At a District Court of the United States for the Eastern District of South Carolina, Begun and Held at the Court-house in the City of Columbia, S. C., on the First Tuesday of November, Being the 4th Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: The Honorable Henry A. M. Smith, District Judge for the District of South Carolina.

Among other, were the following proceedings, to-wit:

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, the Last Two Named being Copartners, Doing Business under the Name of Holley & Dyches, Intervenors,

versus

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Complaint Filed March 4, 1913. Summons filed March 4, 1913. (Set out in bill of exceptions following.)

2 *Bill of Exceptions.*

Filed Dec. 10, 1913.

IN THE UNITED STATES OF AMERICA,
Fourth Circuit. District of South Carolina:

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, the Last Two Named being Copartners, Doing Business under the Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Be it remembered, that the above entitled action was commenced by the filing of the following summons and complaint in the office of the clerk of the United States District Court of the United States for the District of South Carolina, in Charleston, S. C., and the service thereof on the defendant, Illinois Surety Company, on the 6th day of March, 1913. The said original summons and complaint being in form as follows:

3 *Summons.*

Filed March 4, 1913.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the District Court.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Jr., Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Summons for Relief (Complaint Served).

To Ambrose B. Stannard and Illinois Surety Company, defendants in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, in Salisbury, N. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer the complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Henry A. M. Smith, United States Judge for South Carolina, at Charleston, S. C., the 4th day of March, Anno Domini one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the sovereignty and independence of the United States of America.

JOHN L. RENDLEMAN,
Plaintiff's Attorney.

[OFFICIAL SEAL.]

RICHARD W. HUTSON,
C. D. C. U. S., Dist. S. C.

4 *Complaint.*

Filed March 4, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. PEELER and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

The plaintiffs complain of the defendants and allege:

1st.

That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, at all times hereinafter mentioned and are now residents and citizens of the State of North Carolina, of the western district of North Carolina, and reside near Salisbury, Rowan county, in said district and in said State of North Carolina.

2nd.

That at the times hereinafter mentioned the Carolina Electrical Company was a corporation, organized and existing under the laws of the State of North Carolina, and that on the 4th day of October 1912, Joseph B. Cheshire, Jr., was appointed receiver of said corporation.

3rd.

That the defendant, Ambrose B. Stannard, at the times hereinafter mentioned and is now a resident of the State of New York, of the southern district of New York, and resides and has his principal place of business in the city of New York, said State.

5 4th.

That the defendant, the Illinois Surety Company, is a corporation duly organized to do an insurance and bonding business.

5th.

That on the 5th day of July, 1910, Ambrose B. Stannard entered into a written contract with one A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, for and in behalf of the United States of America, for the construction of a U. S. post-office building at Aiken, S. C., for the agreed compensation of $45,-

618.00. That, among other things, it was stipulated in the contract that Ambrose B. Stannard "furnish all of the labor and materials and do and perform all the work required for the construction, complete, of the post-office, at Aiken, South Carolina," the work to be completed by August 1st, 1911.

6th.

That the United States required of the defendant, Ambrose B. Stannard, a bond, which was executed by the defendant, the Illinois Surety Company, as surety, on the 7th day of July, 1910, in the penal sum of twenty-three thousand dollars, to be paid unto the United States of America, which bond contained the condition: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in or additions to or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying labor *of* materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

7th.

That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A.
6 Peeler, partners, trading under the firm name of Faith Granite Company, entered into a contract with the said Ambrose B. Stannard to supply him with certain material to be used in the prosecution of the work provided for in such contract, and that afterwards the said Faith Granite Company entered upon the performance of the contract, and in due performance thereof, between the 20th day of September, 1910, and the 24th day of August, 1911, the said Faith Granite Company, at the special instance and request of the said Ambrose B. Stannard, furnished, supplied and delivered to the said Ambrose B. Stannard certain cut granite work, as provided for and in accordance with the plans and specifications furnished for the work by James Knox Taylor, supervising architect for the United States, which said cut granite work was used in the construction of said post-office building, and for which said cut granite work the said Ambrose B. Stannard promised to pay the sum of thirty-eight hundred and twenty-nine and 65/100 dollars, less the freight charges, which amounted to the sum of $482.25.

8th.

That the defendant, Ambrose B. Stannard, has paid no part of said account, except the freight charges of $482.25, and that there is

now unpaid and due on said account the sum of thirty-three hundred and forty-six and 80/100 dollars, with interest thereon from June 24th, 1911.

9th.

That the said Ambrose B. Stannard has made repeated promises from time to time to pay his said account; that he offered on May 17th, 1912, to give his note for 60 days, with interest at six per cent, which said offer was not accepted; that notwithstanding the oft and repeated promises of the said defendant to pay, he has failed and refused to make settlement, and no part of said account has been paid except the freight charges as stated.

10th.

That on the 16th day of January, 1911, the Carolina Electrical Company, of the city of Raleigh, N. C entered into a written
7 contract with the said Ambrose B. Stannard for certain portions of the work, to-wit: to furnish all the material and labor required under said contract to do all of the work specified under the heading "Conduit and Wiring System," page 36 of the specifications of said contract, to the heading "Approaches," and the wiring of the exterior lamp standards, all in accordance with the plan and requirements of said contract and the samples, brands, fixtures, appliances, etc., required and approved by the supervising architect for use under said contract; that the said Carolina Electrical Company faithfully complied with the terms of the said contract and furnished the said labor and materials required therefor; that the said Ambrose B. Stannard promised to pay the said Carolina Electrical Company, including extra order, amounting to the sum of twenty-five dollars, for the said labor and material, the sum of eight hundred dollars, upon which account has been paid the sum of three hundred and one and 31/100 dollars, leaving unpaid the sum of four hundred and ninety-eight and 69/100 dollars, with interest thereon from January 1st, 1912, at the rate of six per cent per annum.

11th.

That on the 16th day of November, 1912, plaintiffs made the affidavit required by the statute, and procured from the assistant secretary of the Treasury certified copies of the original contract and bonds.

12th.

That Ambrose B. Stannard and the United States accepted from the Faith Granite Company the materials furnished as aforesaid, and the said Ambrose B. Stannard and the United States also accepted the labor and materials furnished by the said Carolina Electrical Company, said work and labor being performed and done and said materials furnished by the said plaintiffs in the necessary prosecution of the work required by the original contract.

13th.

That on or about the 1st day of March, 1913, the claim of Carolina Electrical Company against the said Ambrose B. Stannard for work, labor and materials furnished, amounting to the said sum of
8 $498.69, was assigned and transferred for value to the plaintiff Electrical Engineering & Contracting Company by the said Joseph B. Cheshire, receiver of Carolina Electrical Company, and the said Electrical Engineering & Contracting Company is now the sole owner of said account, and succeeds to all the rights incident to said account heretofore belonging to the said Carolina Electrical Company; that said Electrical Engineering and Contracting Company is a corporation organized and existing under the laws of the State of North Carolina.

Wherefore, the plaintiffs, Faith Granite Company, demands judgment that they recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of thirty-three hundred forty-six and 80/100 dollars with interest from June 24th, 1911; and the plaintiff, Electrical Engineering and Contracting Company, demands judgment that it recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of four hundred and ninety-eight and 69/100 dollars, with interest from January 1st, 1912, until paid.

2nd.

For the costs of the action.

3rd.

For such other and further relief to which the plaintiffs may be entitled.

JOHN L. RENDLEMAN,
Attorney for Plaintiffs.

In response to this summons and complaint each of the defendants appeared by W. H. Townsend, Esq., their attorney of record, on the 4th day of April, 1913, and filed and served separate answers. Thereupon, on April 5th, 1913, the attorneys for the plaintiffs and defendants united in a letter to the clerk of court, of which the following is a copy:

9 "COLUMBIA, S. C., April 5th, 1913.

R. W. Hutson, Esq., Clerk U. S. District Court, Charleston, S. C.

DEAR SIR: In re U. S. to the use & benefit of Peeler et al. v. A. B. Stannard et al.

The defendants have served on the plaintiff's attorney copies of their answers in above case, filed in your office on April 4th, 1913; the undersigned counsel ask that the cause be placed on Calendar One, for trial of issues of fact, raised by said answers; and assigned to be called for trial at the next ensuing regular term of the United

States District Court to be held in Columbia, South Carolina. Please ask the judge to so assign it.

Yours respectfully,

JOHN L. RENDLEMAN,
D. W. ROBINSON,
Plaintiffs' Attorneys.
W. H. TOWNSEND,
Defendants' Attorney."

10 Thereafter, on the 26th day of April, 1913, E. J. Erbelding filed the following petition of intervention in said action, to-wit:

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignees of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes E. J. Erbelding, of Augusta, Georgia, and files this his intervention in the above stated cause in pursuance to a notice served upon him on the 8th day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully shows:

1st. That your intervenor, E. J. Erbelding, entered into a contract with said Ambrose B. Stannard, on the 11th day of February, 1911, "to furnish and install all labor and materials for the plumbing, heating and gas fitting," as per plans and specifications for the new post-office building recently erected at Aiken, S. C., a copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof; said plans and specifications being the same approved by the United States.

2nd. That in pursuance of said contract, your intervenor fully complied with his said contract by furnishing all the material called for under said contract, and furnishing the labor in installing same as required by the plans and specifications used in constructing said Postoffice building; which said contract was completed on the 20th day of July, 1912, and final settlement authorized by the

11 Treasury Department on August 21st, 1912; whereupon said Ambrose B. Stannard became indebted to your intervenor in the sum of $3,950.00.

3rd. Your intervenor shows further that his said work was properly done, according to the plans and specifications required by the

United States, and that the materials furnished were of the kind and class as required by the specifications under which said building was constructed by said Ambrose B. Stannard, and that same was accepted by the United States prior to final settlement with said Ambrose B. Stannard.

4th. Your intervenor further shows that in addition to the amount of said contract price he was required by said Stannard, or his representative, to furnish the material and labor as shown by the itemized statement hereto attached and marked Exhibit "B," and made a part hereof, whereby said Ambrose B. Stannard became further indebted to your intervenor in the sum of $87.60, making the total amount in which said Ambrose B. Stannard became indebted to your intervenor of $4,037.60.

5th. That on June 13th, 1911, there was a payment of $1,000; on November 7th, 1911, a payment of $675.00, making a total of $1,675.00 paid by said Ambrose B. Stannard on said contract price; and on June 26th, 1912, the government deducted $5.00 on the tanks for closets and one radiator short, making a total credit on said amount due your intervenor of $1,685.00, leaving a balance due of $2,352.60, besides interest from July 20th, 1912, at 7%.

6th. That your intervenor has made repeated demands upon said Ambrose B. Stannard for payment of said sum due him, all of which have been refused, and said amount, with interest as aforesaid, is now past due and unpaid.

7th. Your intervenor further shows that said Illinois Surety Company by reason of said Ambrose B. Stannard's failure to pay said balance due upon said contract for material and labor furnished, in the construction of said post-office building, is indebted to your intervenor in the sum of $2,352.60, said Illinois Surety Company being the surety on the bond given by said Ambrose B. Stannard to the United States as required by the department under which said building was constructed

12 Wherefore, your intervenor respectfully prays that his rights in the premises be determined in said above stated cause, and that he have judgment against said principal and surety in said sum, and for such other and further relief to which he may be entitled in the premises.

PIERCE BROS.,
Attorneys for Intervenors.

Thereafter, on the 27th day of June, 1913, B. F. Holley and H. P. Dyches, partners trading under the firm name of Holley & Dyches, filed the following petition of intervention in said action:

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering & Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now come B. F. Holley and H. P. Dyches, partners, trading as Holley & Dyches, of Aiken, S. C., and in said district, and file this their intervention in the above stated cause in pursuance of a notice served upon them on the — day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully show:

1st.

That your intervenors, B. F. Holley and H. P. Dyches, partners, trading as Holley & Dyches, between the first day of August, 1911, and the first day of January, 1912, at the special instance and request of the defendant, Ambrose B. Stannard, furnished to the said Ambrose B. Stannard drayage, crushed rock and labor in the excavation of a cellar under the post-office building at Aiken,
13 S. C., to the amount of two thousand, six hundred and thirty-four and 58/100 dollars, upon which account has been paid the sum of two thousand, one hundred and thirty-three and 87/100 dollars, leaving a balance due of five hundred and 71/100 dollars.

2nd.

That Ambrose B. Stannard and the United States accepted from your intervenors the labor and materials furnished as aforesaid, said work, drayage, labor and materials having been furnished by your intervenors to the said Ambrose B. Stannard in the necessary prosecution of the work being done by the said Ambrose B. Stannard, to-wit: the building of a U. S. post-office building at Aiken, S. C., for said United States.

3rd.

That the defendant, Ambrose B. Stannard, through his superintendent, A. C. Wyckoff, admitted in writing on the — day of August, 1912, the aforesaid balance to be correct; that the said sum of five hundred and 71/100 dollars is long past due, with interest thereon from January 1st, 1912.

4th.

That your intervenors have made repeated demands upon said Ambrose B. Stannard for payment of said sum due them, all of which have been refused, and said amount, with interest as aforesaid, is now past due and unpaid.

5th.

That your intervenors further show that the said Illinois Surety Company, by reason of said Ambrose B. Stannard's failure to pay said balance as aforesaid, in the construction of said post-office building at Aiken, S. C., is indebted to your intervenors in the sum of five hundred and 71/100 dollars, with interest as aforesaid, said Illinois Surety Company being the surety on the bond given by the said Ambrose B. Stannard to the United States as required by the department under which said building was constructed.

Wherefore, your intervenors respectfully pray the court that their rights in the premises be determined in said above stated
14 cause, and that they have judgment against said principal and surety in said sum, and for such other and further relief to which they may be entitled in the premises.

CROFT & CROFT,
Attorneys for Intervenors.

Each of the defendants served separate answers, containing general denials of the facts alleged in the foregoing petitions of intervention.

Thereafter, on the 22nd day of September, 1913, the defendants each served, and filed, notices of a motion, in the nature of a demurrer, to dismiss the original complaint, with the foregoing petitions of intervention, in this action. The notice served and filed by the Illinois Surety Company being in form as follows:

"UNITED STATES OF AMERICA,
Eastern District of South Carolina, Fourth Circuit:

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Jr., Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, Intervenor; B. F. Holley and H. P. Dyches, Partners, Trading as Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

To Messrs. John L. Rendleman and D. W. Robinson, Plaintiff's Attorneys; Croft & Croft, Attorneys for H. P. Dyches & B. F. Holley; Pierce Bros., Attorneys for E. J. Erbelding, Intervenors:

Please take notice, that the undersigned, counsel for the Illinois Surety Company, defendant in the above entitled action, will at

ten o'clock in the forenoon on Friday, the 3rd day of October,
15 1913, or as soon thereafter as counsel can be heard, move upon the original complaint and petitions of intervention filed in the said action, before the Honorable Henry A. M. Smith, United States Judge in the District Court of the United States for the Eastern District of South Carolina, in the United States Court House in Charleston, South Carolina, for an order dismissing the original complaint, together with the petitions of intervention filed in the above entitled action, upon the grounds:

1. That it appears upon the face of said original complaint that it does not state facts sufficient to constitute a cause of action against this defendant, Illinois Surety Company, either at common law or under the provisions and requirements of the act of Congress of February 24th, 1905 (33 Stat. at Large, 811, chap. 778; Comp. Stat. Supp., 1909, p. 948), amending the act of August 13th, 1894 (28 Stat. at L., 278, chap. 280; U. S. Comp. Stat., 1901, p. 2523), and acts amendatory thereof, or any other act of Congress, in that the original complaint does not allege or state that there has been a completion and final settlement of the contract, between said Ambrose B. Stannard and A. Piatt Andrews, assistant secretary of Treasury of the United States, for and in behalf of the United States of America, mentioned in the complaint; nor that the United States had made the last payment to be made by it upon said contract; nor when, if ever, such completion, final settlement or payment were had; nor that such competition and final settlement were had more than six months, and within one year, prior to the time of the commencement of this action.

2. That it appears upon the face of said petitions of intervention filed in the above entitled action by said E. J. Erbelding and by said B. F. Holley & H. P. Dyches, partners, trading as Holley & Dyches, that neither of said petitions of intervention state facts sufficient to constitute a cause of action against this defendant, Illinois Surety Company, in that neither of said petitions state when, if ever, a final settlement was had between said Ambrose B. Stannard and the United States of America, or its officer or officers acting on its behalf, of the contract mentioned in the said complaint; nor that such final settlement was had more than six months, and within one year, before the time of the commencement of this action.

16 3. That even if it should be held that the complaint states facts sufficient to constitute a cause of action against this defendant, under the provisions of the acts of Congress in such case made and provided, this court is without jurisdiction to entertain, proceed in, or try this action at law, for the reason that the remedy and right of action given by the acts of Congress is equitable in its nature and cannot be inquired into or determined at law.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Columbia, S. C., Sept. 22nd, 1913.

The notice of motion and demurrer interposed by Ambrose B. Stannard was upon the same and similar grounds.

These motions and demurrers came on to be heard before the said court, the Honorable Henry A. M. Smith, United States District Judge, presiding, in Charleston, S. C., on the third day of October, 1913. At such hearing the plaintiffs and intervenors asked leave to amend the original complaint and petitions of intervention so as to allege therein the completion of the contract and final settlement thereof on the 21st day of August, 1912. The motion for leave to amend was opposed by the defendants on the grounds that: (1) that no cause of action being stated in the original complaint and petitions, there was nothing to amend by; and (2) that the year limited by the act of Congress within which the action might be brought had expired.

Both motions were heard together, and decided by the court in the following order:

"In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

17 This matter comes on to be heard upon a motion to dismiss the complaint. Due notice of this motion with the grounds thereof in writing have been given more than five days before the hearing, and at the hearing counsel for all interests concerned appeared and were heard. The motion to dismiss is based upon the ground that the complaint is brought under the provisions of the act of August 13, 1894, as amended by the act of 24th February, 1905, and does not allege that there has been a completion and final settlement of the contract between the obligor of the bond and the United States, and that the action has been brought subsequent to the expiration of six months after, and within one year from such completion and final settlement.

The complaint in the cause does not allege that there has been any completion and final settlement between the obligor of the bond, the contractor, and the United States, but does allege that the plaintiff has made the affidavit required by the Statute and procured from the assistant secretary of the treasury a certified copy of the original contract and bond, and upon such procurement alleges that this action was brought. Counsel for plaintiff contend that inasmuch as the plaintiff cannot bring the action until he has procured from the department a certified copy of the bond and contract the allegation that the department has permitted such copies is in effect an allega-

tion of the existence of the condition required by the statute, as these certified copies are presumptively only to be given by the department to a plaintiff in a position to bring the action.

The right of action upon which the complaint is based rests upon the statute. At common law a third party, such as a subcontractor, would have had no right of action upon the bond given to a wholly independent and third party, such as the United States. Under the view taken of this act by the United States Supreme Court, the statute was passed in recognition of the inability of such subcontractors, as the complaint states the plaintiff in this case to be, to take liens upon the public property of the United States, and that Congress passed the act in view of that condition of affairs, and to provide protection for those who could not protect themselves by the ordinary statutory remedies given to subcontractors to protect themselves in such cases, and that for these reasons the statute is one to which a liberal construction should be given by the court. The limitations in the statute are not intended primarily for the benefit of the
18 defaulting or failing original contractor and principal on the bond, but would appear to be intended for the protection of the United States in its enforcement of the bond and for the protection of all creditors entitled under the statute to the benefits of the bond, and for the protection of the sureties on the bond of the original contractor, so far as they should be protected from the inconveniences of being sued in separate harassing actions, and called to respond for the acts of their principal after the lapse of too deferred a period.

The right of action, however, is based upon and arises wholly out of the Statute, and under the decision of the Circuit Court of Appeals of this circuit in Baker v. U. S., 204 Fed. 390, the clauses of the act which create the right and permit its enforcement only if the action be brought within and during the time specified, are not clauses of ordinary limitation, but are conditions accompanying the creation and the gift of the right to the plaintiff. His right of ultimate recovery does not depend only upon the fact that the plaintiff is a creditor of the obligor of the bond for supplies or labor furnished under the contract, the performance of which is secured by the bond, and that his debt has not been paid, but upon the condition further that any creditor proposing to benefit by the statute must not sue prior to the expiration of six months from the completion and final settlement of the contract, and must sue within one year from that completion and settlement so as to give to the creditors the right to sue independently and apart from any suit by the United States, for a period of six months as stipulated in the statute, and no recovery can be had unless the plaintiff can make it appear that in bringing his action he has complied with these conditions. If the right of the plaintiff to recover rests upon his compliance with these conditions, then they are ultimate facts which should be pleaded so as to entitle the plaintiff in the adducing of his testimony on the trial to support his right of recovery by bringing himself within the terms of the statute as alleged in his pleadings.

These limiting conditions are no part of what may be said to be

the fundamental right of action given by the statute. The statute is intended for the benefit of the creditors of the original contractor, and the right of action under the statute is given to them in consideration of the fact that they cannot protect themselves by the other remedies that may exist in the case of the subcontractor on work performed on the property of an individual. The statute is
19 to be liberally construed from this standpoint, and from this standpoint the essential elements of the right of any party to avail himself of the benefit of the statute and bring himself within the category of the parties protected is that he must be a creditor whose labor or material was furnished in the construction of the work specified in the original contract; was furnished to the original contractor and that he has not been paid. The accompanying conditions that there has been a final completion of the contract and settlement with the United States, and that the action has been brought during the six months permitted by the statute, are not essential elements of the original benefits created by the statute, but are necessary conditions to show that the party attempting to avail himself of the statute stands in a position to do so, without which final recovery would not be allowed. The failure to allege them in the complaint is not a failure to allege any cause of action created by the statute, but is a failure to so sufficiently, amply and fully state the cause of action relied upon as to properly allow final judgment to be awarded in behalf of the plaintiff and properly advise the defendant who is called upon to defend himself of the facts which he has to meet upon the trial. If the statute be construed liberally for the benefit of those for whom it was intended, then to hold that the obligor, the original contractor, the defaulting debtor, can be freed from liability as created by the statute by an omission to allege amply the existence of all these conditions, would be to turn to his benefit provisions which were not meant for him. In the language of the Supreme Court of the United States, these conditions if carried to such an extent would defeat the purpose of the statute and would unreasonably interfere with the ultimate benefit intended by it.

In the opinion of the court, therefore, while the facts required by the statute as showing that a final completion and final settlement of the contract with the United States was had, and that the action has been brought within the period prescribed by the statute, are not as clearly and amply stated as they should be, yet a cause of action is sufficiently pleaded in the complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect by way of amendment, under the rule upheld by the Supreme Court of the United States in the case of Missouri, Kansas & Texas Railway Co. v. Wulf, 226 U. S., p. 570.

20 It is therefore ordered, that unless the plaintiff shall within twenty days from the date of this order amend his complaint by alleging in due and sufficient form that there has been a full compliance with the conditions of the statute in the provisions, the compliance with which by this motion are claimed to be not sufficiently averred, the defendants may on proof of such failure, without further notice, move for a dismissal.

In one of the interventions herein brought, to-wit, that filed on behalf of E. J. Erbelding, it is alleged that the contract was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21st, 1912. From this it would inferentially appear in pursuance of the positive allegation that there has been completion and final settlement, that the intervention herein has been interposed within the six months' period allowed by the statute; although there is no allegation that the United States has not brought an action within the six months' period allowed to it, and for an inference on that point it would have to be rested upon the theory that this court would take judicial cognizance if any such action was brought.

The plaintiff having been allowed, if he sees fit, to amend, it need not be considered whether or not this allegation in the intervening petition could be used to supplement and supply any defects and omissions in the way of full and complete settlement in the original contract. The intervenors will be allowed the same time to make any amendments that they may be advised necessary in their intervention, and that question need not be considered unless the plaintiff shall within the time permitted by this order fail to amend his pleading as herein allowed.

The defendants are hereby allowed twenty (20) days after the service of any amended complaint or intervening petition herein upon them or their attorneys within which to answer the same.

The motion to dismiss was also made on the ground that this action should be brought in equity and not at law. In the opinion of the court the action is properly brought as an action at law, and the motion to dismiss on that ground is refused.

HENRY A. M. SMITH,
United States Judge for South Carolina.

October 4th, 1913.

21 The defendants excepted to the foregoing order refusing to dismiss the original complaint and petitions of intervention, and granting the plaintiffs and intervenors leave to amend the same, on the ground that the district judge erred in holding and concluding:

(1) That the limitations in the Statute, so far as the surety on the bond of the original contractor is concerned, were only intended to protect such surety from the inconveniences of being sued in separate harassing actions, and of being called to respond for the acts of its principal after the lapse of too deferred a period; and

(2) That the conditions that there should have been a completion of the contract and final settlement with the United States, and that the action be brought within the six months permitted by the statute, are not essential elements of the original benefit created by the statute and are no part of the fundamental right of action given by the statute; and

(3) That the failure to allege the occurrence of these conditions is not a failure to allege a cause of action under the statute; and

(4) That the allegation in the complaint that the plaintiff had

made the affidavit required by the statute and procured from the assistant secretary of the Treasury a certified copy of the original contract and bond, was in effect an allegation of the existence of the conditions required by the statute as a prerequisite to the bringing of the action; and

(5) That a cause of action under the statute was sufficiently pleaded in the original complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect, by way of amendment; and in refusing the motion to dismiss the complaint; and

(6) That the court could grant, and in granting, leave to amend the complaint, and intervening petitions, by alleging in due and sufficient form that there had been a full compliance with the conditions of the statute in the provisions, the compliance with which by this motion was claimed not to be sufficiently alleged; and

22 (7) That the petition of intervention filed on behalf of E. J. Erbelding alleged a cause of action under the statute on behalf of said intervenor; and

(8) That the action given by said statute is at law.

On October 9th, 1913, the plaintiffs served and filed the following amended complaint:

Amended Complaint.

Filed Oct. 17, 1913.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering & Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

The plaintiffs herein, amending their complaint by leave of the court, and complaining of the defendants, allege:

1. That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, at all times hereinafter mentioned and now are residents and citizens of the State of North Carolina, of the Western District of North Carolina, and reside near Salisbury, Rowan county, in said district, and in said State of North Carolina.

2. That at the times hereinafter mentioned, the Carolina Electrical Company was a corporation organized and existing under the laws of the State of North Carolina, and that on the 4th day of October, 1912, Joseph B. Cheshire, Jr., was appointed receiver of said corporation.

23 3. That the defendant, Ambrose B. Stannard, at the times hereinafter mentioned was and now is a resident of the State of New York, of the Southern District of New York, and resides and has his principal place of business in the city of New York, said State.

4. That the defendant, the Illinois Surety Company, is a corporation duly authorized to do an insurance and bonding business.

5. That on the 5th day of July, 1910, Ambrose B. Stannard entered into a written contract with one A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, for the construction in behalf of the United States of America *for the construction* of a U. S. post-office building at Aiken, S. C., for the agreed compensation of $45,618.00. That, among other things, it was stipulated in the contract that Ambrose B. Stannard "furnish all of the labor and materials and do and perform all the work required for the construction, complete, of the Post Office at Aiken, South Carolina," the work to be completed by August 1st, 1911.

6. That the United States required of the defendant, Ambrose B. Stannard, a bond, which was executed by the defendant, the Illinois Surety Company, as surety, on the 7th day of July, 1910, in the penal sum of twenty-three thousand dollars, to be paid unto the United States of America, which bond contained the condition: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in, or additions to, or ommissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to said surety being hereby waived, and shall promptly *made* payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

24 7. That the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, entered into a contract with the said Ambrose B. Stannard to supply him with certain material to be used in the prosecution of the work provided for in such contract, and that afterwards the said Faith Granite Company entered upon the *the* performance of said contract, and in due performance thereof, between the 20th day of September, 1910, and the 24th day of April, 1911, the said Faith Granite Company, at the special instance and request of the said Ambrose B. Stannard, furnished, supplied and delivered to the said Ambrose B. Stannard certain cut granite work as provided for and in accordance with the plans and specifications furnished for this work by James Knox Taylor, supervising architect for the United States, which said cut granite work was used in the construction of said post-office building, and for which said cut granite work the said Ambrose B. Stannard promised to pay

the sum of thirty-eight hundred and twenty-nine and 05/100 dollars, less the freight charges, which amounted to the sum of $842.25.

8. That the defendant, Ambrose B. Stannard, has paid no part of said account, except the freight charges of $482.25, and that *that* there is now unpaid and due on said account the sum of thirty-three hundred and forty-six and 80/100 dollars, with interest thereon from June 24th, 1911.

9. That the said Ambrose B. Stannard has made repeated promises from time to time to pay his said account; that he offered on May 17th, 1912, to give his note for 60 days, with interest at six per cent., which offer was not accepted; that notwithstanding the oft and repeated promises of said defendant to pay, he has failed and refused to make settlement and no part of said account has been paid except the freight charges as stated.

10. That on the 16th day of January, 1911, the Carolina Electrical Company, of the city of Raleigh, N. C., entered into a written contract with the said Ambrose B. Stannard for certain portions of the work, to wit, to furnish all material and labor required under said contract to do all of the work specified under the heading, "Conduit and Wiring System," page 36 of the specifications
25 of said contract, to the heading "Approaches," and the wiring of the exterior lamp standards, all in accordance with the plans and requirements of said contract and the samples, brands, fixtures, appliances, etc., required and approved by the supervising architect for use under said contract; that the said Carolina Electrical Company faithfully complied with the terms of said contract and furnished the said labor and materials required therefor; that the said Ambrose B. Stannard promised to pay the said Carolina Electrical Company, including extra order amounting to the sum of twenty-five dollars, for said labor and material, the sum of eight hundred dollars, upon which account has been paid the sum of three hundred and one and 31/100 dollars, leaving unpaid the sum of four hundred and ninety-eight and 69/100 dollars, with interest thereon from January 1st, 1912, at the rate of six per cent per annum.

11. That on the 16th day of November, 1912, plaintiffs made the affidavit required by the statute, and procured from the assistant secretary of the Treasury certified copies of the original contract and bonds.

12. That Ambrose B. Stannard and the United States accepted from the Faith Granite Company the materials furnished as aforesaid, and the said Ambrose B. Stannard and the United States also accepted the labor and materials furnished by the said Carolina Electrical Company, said work and material being performed and done and said material furnished by the said plaintiffs in the necessary prosecution of the work required by the original contract.

13. That on or about the 1st day of March, 1913, the claim of Carolina Electrical Company against the said Ambrose B. Stannard, for work, labor and materials furnished, amounting to the said sum of $498.69, was assigned and transferred for value to the plaintiff, Electrical Engineering and Contracting Company, by the

said Joseph B. Cheshire, receiver of Carolina Electrical Company, and the said Electrical Engineering & Contracting Company is now the sole owner of said account, and succeeds to all the rights incident to said account heretofore belonging to the said Caro-
26 lina Electrical Company; that said Electrical Engineering and Contracting Company is a corporation organized and existing under the laws of the State of North Carolina.

14. That the contract by and between Ambrose B. Stannard and A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, made and entered into on the 5th day of July, 1910, was completed by the said Ambrose B. Stannard on the 20th day of July, 1912, and final settlement was made by the Treasury Department of the United States on August 21st, 1912, with the said Ambrose B. Stannard.

15. That no suit was brought by the United States against Ambrose B. Stannard and his surety, the Illinois Surety Company, within six months from the completion and final settlement of said contract upon the contract and bond hereinbefore referred to.

16. That the plaintiffs herein named commenced this action more than six months after the completion and final settlement of said contract above mentioned, and within one year from said completion and final settlement.

Wherefore, the plaintiffs, Faith Granite Company, demands judgment that they recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of thirty-three hundred, forty-six and 80/100 dollars, with interest from June 24th, 1911; and the plaintiff, Electrical Engineering and Contracting Company, demands judgment that it recover of the defendant, Ambrose B. Stannard, and the Illinois Surety Company, the surety, the sum of four hundred and ninety-eight and 69/100 dollars, with interest from January 1st, 1912, until paid.

2nd. For the costs of the action.

3rd. For such other and further relief to which the plaintiff may be entitled.

J. L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Plaintiffs.

October 9th, 1912.

27 On October 11th, 1913, the intervenors, Holley & Dyches, served and filed the following amended petition:

Amended Petition for Intervention by Holly and Dyches.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

Filed Oct. 17, 1913.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes B. F. Holley and H. P. Dyches, partners, trading as Holly & Dyches, of Aiken, S. C. and in said district, and file this their intervention in the above stated cause in pursuance to a notice served upon them on the — day of March, 1913, signed by John L. Rendleman, attorney-at-law for the above named plaintiffs, and respectfully show:

1. That your intervenors, B. F. Holly and H. P. Dyches, partners, trading as Holly & Dyches, between the first day of August, 1911, and the first day of January, 1912, at the special instance and request of the defendant, Ambrose B. Stannard, furnished to the said Ambrose B. Stannard drayage, crushed rock and labor in the excavation of a cellar under the post-office building at Aiken, S. C., to the amount of two thousand, six hundred and thirty-four and 58/100 dollars, upon which account has been paid the sum of two thousand, one hundred and thirty-three and 87/100 dollars, leaving a balance due of five hundred and 71/100 dollars.

28 2. That Ambrose B. Stannard and the United States accepted from your intervenors the labor and materials furnished as aforesaid, said work, drayage, labor and materials having been furnished by your intervenors in the necessary prosecution of the work being done by the said Ambrose B. Stannard, to-wit: the building of the U. S. Post-office building at Aiken, S. C., for the said United States.

3. That the defendant, Ambrose B. Stannard, through his superintendent, A. C. Wyckoff, admitted in writing on the — day of August, 1912, the aforesaid balance to be correct; that the said sum of five hundred and 71/100 dollars is long past due, with interest thereon from January 1st, 1912.

4. That your intervenors have made repeated demands upon said Ambrose B. Stannard for payment of said sum due them, all of

which have been refused and said amount, with interest as aforesaid, is now past due and unpaid.

5. That your intervenors further show that the said Illinois Surety Company by reason of said Ambrose B. Stannard's failure to pay *a* said balance due as aforesaid, in the construction of said Post-office building at Aiken, S. C., is indebted to your interveners in the sum of five hundred and 71/100 dollars, with interest as aforesaid, said Illinois Surety Company being the surety on the bond given by the said Ambrose B. Stannard to the United States, and required by the department under which said building was constructed.

6. That the contract by and between Ambrose B. Stannard and A. Piatt Andrew, assistant secretary of the Treasury of the United States of America, made and entered into on the 5th day of July, 1910, was completed by the said Ambrose B. Stannard on the 20th day of July, 1912, and final settlement was made by the Treasury Department of the United States on August 21st, 1912, with the said Ambrose B. Stannard.

7. That no suit was brought by the United States against Ambrose B. Stannard and his surety, the Illinois Surety Company, within six months from the completion and final settlement of said contract upon the contract and bond hereinbefore referred to.

29 8. That these intervenors filed their petition more than six months after the completion and final settlement of the contract above mentioned and within one year from said completion and final settlement.

Wherefore, your petitioners respectfully pray the court that their rights in the premises be determined in said above stated cause, and that they have judgment against said princip*le* and surety in said sum, and for such other and further relief to which they may be entitled in the premises.

CROFT & CROFT.
Attorneys for Intervenors.

Oct. 11th, 1913.

On the 13th day of October, 1913, the intervenor, E. J. Erbelding, served and filed the following amendment to his petition of intervention:

Amendment to Petition of E. J. Erbelding.

Filed Oct. 15, 1913.

"In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

To the District Court of the United States for the District of South Carolina, at Columbia, S. C.:

Now comes E. J. Erbelding, of Augusta, Ga., one of the intervenors in the above stated case, and after obtaining leave of the court, amends his intervention of file therein as follows:

By amending paragraph two thereof to read as follows (words added by amendment being *italicized*):

30 1st. That in pursuance of said contract *between the United States and the said Ambrose B. Stannard, whereby the said Ambrose B. Stannard was to furnish all the material and labor that was necessary to build and complete said Post-Office building at Aiken, in the county of Aiken, State of South Carolina, at and for the agreed compensation of $45,618.00,* your intervenor fully complied with his said contract by furnishing all the material called for under said contract, and furnishing the labor in installing same as required by the plans and specifications used in constructing said post-office building. Said *original* contract *between said Ambrose B. Stannard and the United States* was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21st, 1912, *which said final settlement for Said Original contract between the United States and said Ambrose B. Stannard was actually had more than six months before the filing of this intervention, and that same was filed before the expiration of one year after the complete performance of said contract and final settlement therefor, as aforesaid; and that no suit was brought by the United States in its own behalf against the said Ambrose B. Stannard, and the surety on his bond, the Illinois Surety Company, during the first six months after the final completion of, and final settlement for, said original contract;* whereupon said Ambrose B. Stannard became indebted to your intervenor in the sum of $3,950.00.

2nd. By amending paragraph seven of his intervention so as to read as follows (words added by way of amendment being *italicized*):

Your intervenor further shows that the Illinois Surety Company, by reason of said Ambrose B. Stannard's failure to pay said balance due upon said contract for material and labor furnished, in the con-

struction of said post-office building, is indebted to your intervenor in the sum of $2,353.50, said Illinois Surety Co. being the surety on the bond given by said Ambrose B. Stannard to the United States as required by the department under which said building was constructed, *which said bond was conditioned as follows: "Now, if the said Ambrose B. Stannard shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform*
31 *all the work and furnish all the labor and materials required by any and all changes in, or additions to, or omissions from said contract which may hereafter be made, and perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to the said surety being waived, and shall promptly make payment to all persons supplying labor and materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."*

Wherefore, intervenor prays that the above amendment be made a part of his original intervention.

PIERCE BROS.,
Attorneys for Intervenor.

On the 15th day of October, 1913, the defendant, Illinois Surety Company, served, and filed, the following answers to said amended complaint and petition of intervention:

Answer of Illinois Surety Co. to Amended Complaint.

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the
32 court permitting the plaintiffs to serve an amended complaint in this action), answering the amended complaint in the above entitled action:

First. For a first defense, alleges: That no final settlement of the

contract mentioned in the fifth paragraph of the amended complaint between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting on its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized, as against this defendant, Illinois Surety Company, under act of Congress, or any other law.

Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, was had and made between the parties to said contract more than one year before the time of the making of the order permitting the service of the amended complaint in this action, and more than one year prior to the time of the service and of the filing of said amended complaint; and that whatever right of action the plaintiffs may have had against this defendant upon the bond mentioned in the complaint was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense against the claim of the Engineering and Contracting Company, alleges: That neither the Electrical Engineering and Contracting Company nor the Carolina Electrical Company were at the times mentioned in the complaint, nor now are, a corporation organized or existing under the laws of any state; nor was Joseph B. Cheshire at the times mentioned in the complaint a receiver of said Carolina Electrical Company, nor was he authorized to transfer any choses of action belonging to said Carolina Electrical Company for the purpose of permitting actions to be maintained thereon in the courts of this State.

Fourth. For a fourth defense: Denies the allegations of paragraphs two, ten, thirteen and sixteen of said amended complaint, and also denies that final settlement of the contract mentioned in
33 paragraphs five and fourteen of said amended complaint was had on August 21st, 1912, and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due the said Ambrose B. Stannard in final settlement of said contract.

Denies that said Ambrose B. Stannard promised or agreed to pay the plaintiffs, J. A. Peeler, L. M. Peeler and P. A. Peeler, partners, trading under the firm name of Faith Granite Company, the sum of thirty-eight hundred and twenty-nine and 05/100, less freight charges, for the material and labor furnished, mentioned in paragraph seven of the amended complaint, and says he only promised and agreed to pay the sum of three thousand, six hundred and twenty-five dollars for the material called for by said contract, to be approved by the officers of the United States, prepared in a workmanlike manner, and delivered free on board of cars at Aiken, South Carolina, promptly and as fast as it might be needed by said Stannard to enable him to carry out his said contract with the United

States, and that this defendant denies that this work was done, and this material furnished, by said Faith Granite Company either promptly as needed by said Stannard or as required by said contracts; and denies that there is now unpaid or due to the said Fith Granite Company by said Ambrose B. Stannard any sum whatever in excess of the sum of eighteen hundred and forty-six and 86/100 dollars; and says that the offer to give his note in settlement of claim against him was made as an offer of compromise only, and not as an admission of the amount claimed by the plaintiffs to be due them. Says that a large portion of the material furnished by the plaintiffs was in such condition or shape that it could not be used and had to be discarded and rejected.

Fifth. For a fifth defense, and by way of off-set or counter claim against the claim of the Faith Granite Company, alleges: That by reason of, and in consequence of, the unworkmanlike and incorrect manner in which the Faith Granite Company cut and prepared the granite and stone furnished to said A. B. Stannard by them, and the careless and negligent delays made by them in preparing and
34 furnishing the material called for by their contract with the said A. B. Stannard, the said A. B. Stannard was delayed for more than one hundred and forty-nine days in the completion of his contract with the government for the construction of said post-office building, in consequence of which delay he lost the sum of seven hundred and ninety-two and 61/100 dollars, deducted from the moneys which would otherwise have been paid him by the government under said contract, and also the further sum of two hundred and sixty-one dollars and eighty-seven cents deducted by the government from the funds which would otherwise have been paid him had the said stone and granite been promptly furnished by said Faith Granite Company in proper condition when needed by said Stannard in the performance of his contract with the government for the construction of said building; and was otherwise damaged in the loss of time of hands employed by him, and additional expenses incurred, to the extent of fifteen hundred dollars; which amount this defendant claims and demands should be offset against and deducted from the amount claimed in this action by the Faith Granite Company.

Wherefore, the defendant, Illinois Surety Company, demands judgment that the above entitled action be dismissed.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Columbia, S. C., October 15th, 1913.

35 *Answer of Illinois Surety Company to Petition of Intervention Filed by Holley & Dyches.*

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the court permitting said intervenors to serve an amended petition, and the plaintiffs to serve an amended complaint in this action), answering the amended petition of intervention filed by B. F. Holley and H. P. Dyches in the above entitled action:

First. For a first defense, alleges: That no final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of said amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized, as against this defendant, Illinois Surety Company, under act of Congress or any other law.

36 Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of said amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, was had and made between the parties to said contract more than one year before the time of the making of the order permitting the service of the amended petition of intervention by the above named petitioners, and more than one year before the making of any order allowing the intervention of the petitioners in this action, and more than one year prior to the time of service of said amended complaint and said amended petition, and that whatever right of action the said petitioners may have had against this defendant upon the bond mentioned in the amended complaint and the amended peti-

tion was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense, Denies the allegations of the fifth paragraph of said amended petition, and says that it has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in the first, second, third and fourth paragraphs of said amended petition, and therefore denies the same.

Denies that the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the sixth, seventh and eighth paragraphs of the amended petition, was had on August 21st, 1912; and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due the said A. B. Stannard in final settlement of said contract.

Says that there was no order taken permitting the petitioners to file their petition, or to intervene, in this action during the period commencing six months after the final settlement of said contract and ending one year after the time of such final settlement.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Columbia, S. C., October 15th, 1913.

37 *Answer of Illinois Surety Company to Amended Petition of Intervention Filed by E. J. Erbelding.*

Filed Oct. 20, 1913.

UNITED STATES OF AMERICA.
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

The defendant, Illinois Surety Company (not waiving but reserving and insisting upon its right to except to the order of the court permitting the said intervenor to serve an amended petition, and the plaintiffs to serve an amended complaint), answering the amended petition of intervention filed by E. J. Erbelding in the above entitled action:

First: For a first defense, alleges: That no final settlemen- of the contract mentioned in the fifth paragraph of the amended complaint, and in the second and seventh paragraph of the amended petition, between the defendant, Ambrose B. Stannard, and the United States of America, or its officers acting in its behalf, had been made or had six months prior to the 4th day of March, 1913, the date of the commencement of this action; and that the commencement and prosecution of this action was, and is, unauthorized as against the defendant under any act of Congress or other law.

38 Second. For a second defense, alleges: That the final settlement of the contract mentioned in the fifth paragraph of the amended complaint, and in the second and seventh paragraphs of said amended petition, between Ambrose B. Stannard and the United States of America, or its officers acting in its behalf, was had or made between the parties to said contract more than one year before the making of the order permitting the service of the amended complaint and amended petition of intervention by the above named intervenor, and more than one year prior to the time of the making of any order allowing the intervention of the petitioners in this action, and more than one year prior to the time of the service of the amended complaint and said amended petition, and that whatever right of action the said petitioner may have had against this defendant upon the bond mentioned in the amended complaint and amended petition was then lost and barred under the terms and limitations contained in the act of Congress.

Third. For a third defense, says: That it has not knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth, fifth and sixth paragraphs of said petition of intervention, or any of said paragraphs, and therefore denies the same.

Denies that the petitioner fully performed the contract made between him and the said Stannard, and denies that the final settlement of the contract mentioned in the fifth paragraph of the complaint, and in the second and seventh paragraphs of said amended petition, was had on the 21st day of August, 1912, and says, on the contrary, that such final settlement was not had until the 11th day of September, 1912, on which last mentioned day a checque was issued by the disbursing officer of the United States for the amount due said A. B. Stannard in final settlement of said contract.

Says that there was no order taken permitting the petitioner to file his petition of intervention, or to intervene, in this action during the period commencing six months after the final settlement of said contract, and ending one year after the time of such final settlement.

Denies that there was any agreement by the defendants, or either of them, to pay interest to the petitioner on the moneys mentioned in the petition and that any interest thereon is due by this defendant.

39 Fourth. For a fourth defense: Alleges upon information and belief that all of the contract price which was to have been paid said E. J. Erbelding by said Ambrose B. Stannard has been paid

him, except the sum of eighteen hundred and fifty-eight and 96/100 dollars.

Fifth. For a fifth defense, and by way of set-off or counter claim against the claim of the petitioner, this defendant, upon information and belief, alleges: That said E. J. Erbelding negligently performed the work required of him under said contract in a negligent, dilatory and inefficient way and manner, and delayed remedying the errors made by him in the performance of said contract until compelled by the defendant, Ambrose B. Stannard, and the gov-ment to correct the same, and in consequence of such negligent delay and dilatory action on the part of said E. J. Erbelding in the performance of said contract the completion of said work was delayed for one hundred and forty-nine days beyond the date at which said work should have been completed under the terms of the contract, and in consequence of such delay deductions to the amount of seven hundred and ninety-two and 61/100 dollars were made by the government from the amount which the government would have paid for said work had it been completed within the time limited by the contract, and said negligent delay on the part of the petitioner in performing his said contract the defendant, Ambrose B. Stannard, was put to and forced to incur other additional expenses in the completion of said work, to his damage in the sum of fifteen hundred dollars, which should be offset against the moneys claimed by the petitioner.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Columbia, S. C., October 15th, 1913.

The defendant, Ambrose B. Stannard, also answered said amended complaint and amended petitions, setting up substantially the defenses set up by the Illinois Surety Company, and the supplemental and additional defense that during the pendency of this action he had been adjudicated a bankrupt and received a discharge in bankruptcy from his individual liability on the contracts stated in the pleadings in this action. This supplemental defense in favor of said Stannard being sustained by the court in its order, or findings of fact
40 and conclusions of law at the hearing on the merits, the answers of said Stannard in these proceedings are omitted from this bill of exceptions as irrelevant matter.

On October 31st, 1913, the plaintiffs and the intervenor Erbelding served and filed replies, containing general denials of so much of the foregoing answers of the Illinois Surety Company as alleged causes of action for set-off against them, respectively.

Jury trial of the issues involved was waived by written stipulation of the attorneys for all parties, plaintiffs, intervenors and defendants, and the action came on to be heard before the Honorable Henry A. M. Smith, United States Judge, in the November, 1913, term of the District Court of the United States for the District of South Carolina, at Columbia, S. C.

The plaintiffs offered in evidence copies of the charters of articles of incorporation of the Electrical Engineering and Contracting Com-

pany and of the Carolina Electrical Company from the office of the secretary of state of the State of North Carolina, certified under his signature and the great seal of that state, the certificate being in form as follows:

5939.

NORTH CAROLINA,
Wake County:

Certificate of Incorporation of "Carolina Electrical Company."

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the laws of the State of North Carolina, as contained in Chap. 21 of the Revisal of 1905, entitled "Corporations," and do severally agree to take the number of shares of capital stock in the said corporation set opposite our names, respectively, and to that end do hereby set forth:

First. The name of the corporation is "Carolina Electrical Company."

41 Second. The location of the principal office of the corporation shall be at and in the city of Raleigh, State of North Carolina.

Third. The objects of this corporation are as follows:

(1) To contract for the installation of, and to install in public and private buildings, on the streets of towns and cities, on the highways and elsewhere, systems or plans for electric lighting, gas lighting, heating by steam, water or hot air, sewerage, power furnishing, and any and all kinds of plumbing, wiring, and any and all kinds of construction work and equipment of buildings, railways, electric lighting and power work, gas work, &c., and to buy, sell, manufacture and install electrical apparatus, fixtures and supplies, and gas and steam engines and supplies, and automobiles and automobile supplies.

(2) To erect, build, establish and maintain any sort of building, equipment and appliances, and at its pleasure, to sell or otherwise dispose of any part thereof, and to sub-lease or rent any part of its building or equipment.

(3) To conduct shops for the manufacture, repair and sale of any kind of machinery or articles, and to conduct a store or stores, for the sale of machinery and any other articles of merchandise.

And in order to prosecute the objects and purposes above set forth, the corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property both real and personal in this State and other states, territories, &c.; to purchase the business, good will and other property of any individual, firm or corporation as a going concern, and to assume its debts, contracts and liabilities, provided such business is authorized by the powers herein contained; to construct, equip and maintain works, buildings, factories and plants, and to operate the same by hand, steam, water, electric or other motive power, and generally to perform all acts which may be deemed necessary or ex-

pedient for the proper and successful prosecution of the objects and purposes for which this corporation is created.

Fourth. The total amount of the capital stock of this corporation is $15,000.00 and the number of shares into which the same is divided is one hundred and fifty; of said stock $10,000.00, divided
42 into one hundred shares of the par value of $100.00 each, shall be general or common stock, and $5,000.00, divided into fifty shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holders to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart, for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend day thereafter. However, this corporation may organize and begin business when forty-nine shares ($4,900.00) of the capital stock shall have been subscribed for.

Fifth. The names and post-offices addresses of the subscribers of stock, and the number of shares subscribed for by each, the aggregate of which being the amount of the capital stock with which this corporation will start business, are as follows:

	No. of Shares.
N. L. Walker, Raleigh, N. C.	Seventeen (17)
J. R. Young, Raleigh, N. C.	Four (4)
T. B. Crowder, Raleigh, N. C.	Four (4)
Mrs. F. P. Tucker, Raleigh, N. C.	Four (4)
C. K. Durfey, Raleigh, N. C.	Four (4)
D. J. Thompson, Raleigh, N. C.	Sixteen (16)

Sixth. The period of existence of this corporation is limited to sixty years.

Seventh. The board of directors of this corporation shall have the power, by vote of a majority of all the directors, and without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of this corporation.

In testimony whereof, we have hereunto set our hands and affixed our seals, this 23 day of March, 1908.

N. L. W...KER. [SEAL.]
T. B. CROWDER. [SEAL.]
C. K. DURFEY. [SEAL.]
D. J. THOMPSON. [SEAL.]

43 NORTH CAROLINA,
Wake County:

This is to certify that on this 23rd day of March, 1908, before me, a notary public, personally appeared N. L. Walker, T. B. Crowder, C. K. Durfey and D. J. Thompson, who, I am satisfied, are the persons named in and who executed the foregoing certificate of incorporation of "Carolina Electrical Company," and I having first made

known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and official seal this 23 day of March, 1908.

[NOTARIAL SEAL.] J. S. FULGHUM,
Notary Public.

My commission expires (2/18/10).

Filed March 24, 1908.

J. BRYAN GRIMES,
Secretary of State.

STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE,
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in the office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

44 NORTH CAROLINA,
Wake County:

No. 9897.

Certificate of Incorporation of "Electrical Engineering and Contracting Company."

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the laws of the State of North Carolina, as contained in chapter 21 of the revisal of 1905, entitled "Corporations," and do severally agree to take the number of shares of capital stock in the said corporation set opposite our names respectively, and to that end do hereby set forth.

First. The name of the corporation is "Electrical Engineering and Contracting Company."

Second. The location of the principal office of the corporation shall be at and in the city of Raleigh, State of North Carolina.

Third. The objects of this corporation are as follows:

(1) To contract for the installation of, and to install in public and private buildings, on the streets of towns and cities, on the highways and elsewhere, systems or plans for electric lighting, gas lighting, heating by steam, water or hot air, sewerage, power furnishing, and any and all kinds of plumbing, wiring, and any and all kinds of construction work and equipment of buildings, railways, electric

lighting and power work, gas work, etc., and to buy, sell, manufacture and install electrical apparatus, fixtures and supplies, and gas and steam engines and supplies, and automobiles and automobile supplies.

(2) To erect, build, establish and maintain any sort of building, equipment and appliances, and at its pleasure, to sell or otherwise dispose of any part thereof, and to sublease or rent any part of its building or equipment.

(3) To conduct shops for the manufacture, repair and sale
45 of any kind of machinery or articles, and to conduct a store or stores, for the sale of machinery and any other articles of merchandise.

And in order to prosecute the objects and purposes above set forth, the corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property both real and personal in this State and other States, territories, etc., to purchase the business, good will and other property of any individual, firm or corporation as a going concern, and to assume its debts, contracts and liabilities, provided such business is authorized by the powers herein contained; to construct, equip and maintain works, buildings, factories and plants, and to operate the same by hand, steam, water, electric or other motive power, and generally to perform all acts which may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which this corporation is created.

Fourth. The total amount of the capital stock of this corporation is $15,000.00 and the number of shares into which the same is divided is one hundred and fifty; of said stock $10,000.00, divided into one hundred shares of the par value of $100.00 each, shall be general or common stock, and $5,000.00, divided into fifty shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holders to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart, for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend day thereafter. However, this corporation may organize and begin business when fifteen shares ($1,500.00) of the capital stock shall have been subscribed for.

Fifth. The names and postoffices addresses of the subscribers of stock, and the number of shares subscribed for by each, the aggregate of which being the amount of the capital stock with which this corporation will start business, are as follows:

S. T. Stewart, Raleigh..... 5
C. N. Freeman, Raleigh..... 9
B. E. Taylor, Raleigh..... 1

46 Sixth. The period of existence of this corporation is limited to sixty years.

Seventh. The board of directors of this corporation shall have the power, by vote of a majority of all the directors, and without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of this corporation.

In testimony whereof, we have hereunto set our hands and affixed our seals, this 13th day of March, 1912.

SHELLUM P. STEWART. [SEAL.]
C. W. FREEMAN. [SEAL.]
B. E. TAYLOR. [SEAL.]

NORTH CAROLINA,
Wake County:

This is to certify that on this 13th day of March, 1912, before me, a notary public, personally appeared C. N. Freeman, B. E. Taylor and S. T. Stewart, who, I am satisfied, are the persons named in and who executed the foregoing certificate of incorporation of "Electrical Engineering and Contracting Company," and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and official seal this 13th day of March, 1912.

[NOTARIAL SEAL.] CAREY K. DURFEY,
Notary Public.

My commission expires Sept. 19, 1912.
Filed March 13, 1912.

J. BRYAN GRIMES,
Secretary of State.

47 No. 10093.

Amendment of Certificate of Incorporation of Carolina Electrical Company.

Resolution of Directors.

The board of directors of the Carolina Electrical Company, a corporation of North Carolina, on the 3rd day of May, 1912, adopted the following resolution:

Resolved, That in the judgment of the board of directors of this company it is advisable to change the certificate of incorporation so as to provide for the issuing of capital stock in the additional amount of $35,000.00, divided into 350 shares of the par value of $100.00 per share, of which $30,000.00 shall be common capital stock consisting of 300 shares of the par value of $100.00 each and $5,000.00 shall be preferred capital stock consisting of fifty shares of the par value of $100.00 each, making the total authorized capital of the company $50,000.00.

Resolved, further, That a special meeting of the stockholders of this company be, and the same is hereby called to meet at the office of the company, in the city of Raleigh, at 10:40 A. M., on the 3rd

day of May, 1912, for the purpose of considering and taking action upon the proposed amendment to the certificate of incorporation, and the secretary is directed to give ten days' notice of said meeting, personally or by mail, to each stockholder of this company, unless said notice is waived by the stockholder.

Certificate of Change.

The Carolina Electrical Company, a corporation of North Carolina, doth hereby certify that pursuant to the foregoing resolution of its board of directors it has this day adopted the following resolution:

Resolved, That it is deemed advisable to change the certificate of incorporation of the Carolina Electrical Company by striking therefrom paragraph four, which prescribes the amount and character of capital stock which the company may issue and by inserting in lieu thereof the following:

48 Fourth. The total amount of the capital stock of this corporation is $50,000.00, and the number of shares into which same is divided is 500, of which said stock $40,000.00, divided into 400 shares of the par value of $100.00 each, shall be general or common stock, and $10,000.00 divided into 100 shares of the par value of $100.00 each, shall be preferred stock. Said preferred stock shall entitle the holder to receive each year out of the net earnings of the company a fixed yearly dividend of seven per centum before any dividends shall be paid upon, or set apart for said general or common stock. Such dividend on the preferred stock shall be cumulative and payable semi-annually on the first day of January and July, respectively in each year. Said preferred stock shall, at the discretion of the company, be subject to redemption at par at the end of three years, or on any dividend date thereafter; provided, however, this corporation may organize and begin business when forty-nine shares ($4,900.00) of the capital stock shall have been subscribed for."

That more than two-thirds in interest of all the stockholders of said company voted in favor of said resolution, and that their written assent to said amendment is hereto annexed.

In witness whereof, said corporation has caused this certificate to be signed in its name by its president and secretary, and its corporate seal to be hereto affixed, the 3rd day of May, 1912.

[CORPORATE SEAL.]

CAROLINA ELECTRICAL COMPANY,
By N. L. WALKER, *President.*

Attest:
C. N. FREEMAN, *Secretary.*

49 Stockholders' Assent to Change.

We, the subscribers, being at least two-thirds in interest of all the stockholders of the Carolina Electrical Company, having, at a meeting regularly called for the purpose, voted in favor of the resolution to amend paragraph four of the certificate of incorporation of said company, providing for an increase of $35,000.00 in the

capital stock, do now, pursuant to the statute hereby give our written assent to said change.

Witness our hands, this the 8th day of May, 1912.

Stockholders.	Number of Shares.
T. B. Crowder	4
N. L. Walker	64
C. N. Freeman	9
E. E. Culbreth	5
James R. Young	6

NORTH CAROLINA,
Wake County:

This is to certify that on this the 9th day of May, 1912, before me personally appeared C. N. Freeman, secretary of the Carolina Electrical Company, the corporation mentioned in and which executed the foregoing certificate, who, being by me duly sworn, on his oath says that he is such secretary, and that the seal affixed to said certificate is the corporate seal of said corporation, the same being well known to him; that N. L. Walker, is president of said corporation, and signed said certificate and affixed said seal thereto, and delivered said certificate by authority of the board of directors and with the assent of at least two-thirds in interest of all the stockholders of said corporation, in the presence of deponent, who thereupon subscribed his name thereto as witness.

And he further says that the assent hereto appended is signed by at least two-thirds in interest of all the stockholders of said corporation.

[NOTARIAL SEAL.] J. W. SMITH,
Notary Public.

Commission expires 21st day of December, 1913.

Filed May 9, 1912.

J. BRYAN GRIMES,
Secretary of State.

50 STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE.
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

STATE OF NORTH CAROLINA,
DEPARTMENT OF STATE,
RALEIGH, July 17, 1913.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (four (4) sheets) to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 17th day of July, in the year of our Lord, 1913.

[OFFICIAL SEAL.] J. BRYAN GRIMES,
Secretary of State.

Aiken, S. C., P. O.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
October 18, 1913.

Pursuant to section 882 of the revised statutes I hereby certify that the annexed papers are true and correct copies of certain
51 letters, etc., or of excerpts therefrom, relating to the contract of Ambrose B. Stannard for the construction of the post-office at Aiken, South Carolina, on file in this department.

In witness whereof, I have hereunto set my hand, and caused the seal of the treasury department to be affixed, on the day and year first above written.

[Seal of Treasury Department.]

BYRON R. NORTON,
Assistant Secretary of the Treasury.

Aiken, S. C., P. O.

Ass't Sec'y Allen. Approves Settlement with Ambrose B. Stannard damages charged. Aiken, S. C.

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
WASHINGTON, August 21, 1912.

The Honorable the Secretary of the Treasury.

SIR: I have the honor to inform you that on July 5, 1910, the department entered into a contract with Ambrose B. Stannard of New York, N. Y., for the construction complete of the U. S. post-office building at Aiken, S. C.

Contract dated, July 5, 1910.

Time to complete, August 1, 1911.

Liquidated damages for delay, $40.00 per diem.

The work was practically completed June 3, 1912, ten months and three days beyond the contract time.

The following is a condensed statement of the account:

Contract, construction complete	$45,618.00
Additions from time to time	569.92
	$46,187.92
Deductions from time to time	261.87
	$45,926.05
Payments on account	41,134.43
Balance due	$4,791.62

52 The chief of the technical division of this office, under date of the 15th instant, certified that all work embraced in this contract had been satisfactorily completed, and that all necessary proposals for additions, deductions, etc., affecting the contract as originally awarded had been received and had appropriate final action.

In view of the foregoing, and of the fact that to charge the contractor with the per diem amount of liquidated damages specified in the contract would be greatly in excess of the actual damages to the government, I have respectfully to recommend that only the actual damages, amounting to $792.61, be charged, and authority given for the issue and payment of a voucher in favor of the contractor for $3,999.01, the balance outstanding under the contract and additions thereto, after making the deductions indicated.

Respectfully,

O. MENDEROTH,
Supervising Architect.

Secretary of the Treasury, Aug. 21, 1912—3—Aiken, S. C.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
August 21, 1912.

Approved, and actual damages charged, as recommended: by direction of the secretary.

SHUMAN ALLEN,
Assistant Secretary.

AIKEN, S. C., August 23, 1912.

The Custodian, Postoffice, Aiken, S. C.

SIR: Referring to contract with Ambrose B. Stannard dated July 5, 1910, for the construction, complete of the U. S. Postoffice building in your custody, I have to advise you that the
53 department, on the 21st instant, charged against the contractor the sum of $792.61, to cover the extra expense resulting to the government on account of 149 days' delay in the completion of said building, and authority has been given for the issue and payment of a voucher in favor of the contractor for $3,999.01, the balance outstanding under the contract and additions thereto, after making the deduction indicated. You are, therefore,

hereby directed to prepare, certify, and issue a voucher in the sum named and forward it to the contractor for signature and reference to the department for payment.

The following is a statement of the account, which should be copied literally upon the face of the voucher:

Contract, Construction, Complete		$45,618.00
Addition, (Pro.), Dec. 28, 1910	$129.92	
" (" 3957), Mar. 4, 1911	440.00	
		569.92
		$46,187.92
Deduction (Pro.), May 10, 1911	$50.00	
" ("), Jan. 12, 1912	12.87	
" (D./L.), May 13, 1912	30.00	
" (Pro.), June 13, 1912	134.00	
" ("), June 21, 1912	10.00	
" ("), July 22, 1912	5.00	
" ("), July 22, 1912	5.00	
" ("), July 22, 1912	15.00	
		261.87
		$45,926.05

Deductions on account of 149 days' delay as follows:

Rent of P. O. quarters at $700 per annum	$289.73	
Salary of Supt., at $1,095 per annum	453.21	
Rent of Supt.'s office at $10.00 per mo	49.67	
		792.61
		$45,133.44
Payments on account		41,134.43
Balance due		$3,999.01

Respectfully,

JAS. W. WETMORE,
Executive Officer.

54 X-File, Sacramento, Cal.

AIKEN, S. C., August 23, 1912.

Mr. Ambrose B. Stannard, U. S. Rubber Company Building, New York City.

SIR: Referring to your contract dated July 5, 1910, for the construction complete of the U. S. postoffice building at Aiken, S. C., I have to advise you that the department, on the 21st instant, charged your account with the sum of $792.61, the actual additional expense resulting to the government by 149 days' delay in the completion of said work, and that authority has this day been given

for the issue and payment of a voucher in your favor for $3,999.01, being the balance outstanding under your contract and additions thereto, after making the deduction indicated.

The extra expense referred to is made up as follows:

Rent of P. O. quarters at $700.00 per annum	$289.73
Salary of Supt., at $1,095.00 per annum	453.21
Rent of office for Supt., at $10.00 per mo	49.67
Total	$792.61

A detailed statement of the account will be shown on the voucher, which the custodian of the building will issue and forward to you for signature. Prompt action will be taken relative to the payment of said voucher upon its receipt by the department.

Final settlement under your contract for the Federal building at Sacramento, Cal., is now receiving consideration.

Respectfully,

JAMES W. WETMORE,
Executive Officer.

55 10878.

TREASURY,
WASHINGTON, D. C., Sept. 11, 1912.

Assistant Treasurer of the United States, New York, N. Y.:

Pay to the order of Ambrose B. Stannard $3,999.01/100 Three Thousand Nine Hundred Ninety-Nine 01/100 Dollars.

Object for which drawn —.

S. R. JACOBS,
Disbursing Clerk,
By Deputy, M. W. RISHARD,
Disbursing Clerk.

ARCH.

Endorsement: Ambrose B. Stannard. Sept. 12, 1912. Received payment through the New York Clearing House. Second National Bank of the city of N. Y. Endorsement guaranteed. Sep. 13, '12. W. M. Pabst, Cashier.

56 Postoffice, Aiken, South Carolina.

The United States to Ambrose B. Stannard, Dr.

NEW YORK, N. Y., Aug. 26, 1912.

Contract, Construction Complete		$45,618.00
Addition, (Pro.), Dec. 28, 1910	$129.92	
" (" 2957), Mch. 4, 1911	440.00	
		569.92
		$46,187.92

Deduction	(Pro.	), May	10, 1911.....	$50.00	
"	("	), Jan.	12, 1912.....	12.87	
"	(D./L.	), May	13, 1912.....	30.00	
"	(Pro.	), June	13, 1912.....	134.00	
"	(Pro.	), June	21, 1912.....	10.00	
"	(Pro.	), July	22, 1912.....	5.00	
"	(Pro.	), July	22, 1912.....	5.00	
"	(Pro.	), July	22, 1912.....	15.00	
					261.87
					$45,926.05

Received. Office Supervising Architect. Aug. 29, 1912.
All proposals not attached to this voucher heretofore sent to auditor. Copy of settlement letter attached.

57 Aiken, South Carolina Postoffice.

The United States to Ambrose B. Stannard, Dr.

NEW YORK, N. Y., Aug. 26, 1912.

Bro-t forward		$45,926.05
Deduction on account of 149 days' delay, as follows:		
Rent of postoffice quarters, @ $700, per a...	$289.73	
Salary of Supt. @ $1,095, per annum.....	453.21	
Rent of Supt. office, @ $10.00 per mo.....	49.67	
		792.61
		$45,133.44
Payments on account		41,134.43
Balance due		$3,999.01

Custodians.—Permit no delay in forwarding discount vouchers, as checks in payment thereof must reach payee before discount day. See also paragraphs 6 and 7 custodians' instructions.
(Certification and bill to be completely filled in by payee, or before signature by payee, without alteration or erasure at any time.)

I certify that the above bill is correct and just and that payment therefor has not been received.
$3,999.01.

AMBROSE B. STANNARD,
Contractor.

(Not to be signed in duplicate.)
(Any notations made in spaces provided therefor on the back of this voucher become a part of this certificate.)

I hereby certify that the above articles have been received by me in good condition, or the service performed as stated; that they were necessary for the public service; that the prices charged are just,

58 reasonable, and in accordance with the agreement, and that they were secured in accordance with sections 1 and A of the methods stated on the reverse hereof.

Approved for $3,999.01.

C. E. CARMAN, *Custodian.*

By order of the Secretary:

JNO. W. PARSONS,

Chief Division of Accounts.

Paid by check No. 10878, dated Sep. 11, 1912, drawn on New York.

Voucher No. —. Treasury Department, Office of Supervising Architect. Appropriation: Post office, Aiken, S. C. Amount $3,999.01 in favor of Ambrose B. Stannard, New York, N. Y. Building. U. S. Post office, Aiken, S. C. For Purchases, and Services other than Personal. Disbursing Clerk, Received Sept. 10, 1912. Treasury Department. X-File, Aiken, S. C. P. O. Ambrose B. Stannard, Contractor, etc. (Notable Contracts). Naming 21 Contracts.

59 Aug. 24, 1912.

Supervising Architect, U. S. Treasury, Washington, D. C.

SIR: I have to acknowledge receipt of your letter of Aug. 20th notifying me that in settlement of my account for construction of P. O. Bldg., Aiken, S. C., has been taken up by the Dep't, and that voucher will be issued—in amount $3,999.01—in full settlement.

I note the statement in your said letter that final settlement, under my contract for extension and remodelling of Federal Bldg., Sacramento, Cal., is now receiving consideration.

I ask that consideration be immediately given final settlement with me for contracts for construction of P. O. Bldg., at Malone, N. Y., and extension and remodelling of Federal Bldg., Bath, Maine—both of these operations being completed and having received final inspection.

Respectfully,

AMBROSE B. STANNARD.

Received Office Supervising Architect, Aug. 26, 1912.

The defendants objected to the introduction of these copies in evidence on the ground that the certificates were not in the form prescribed by section 906 of the revised statutes of the United States, in that it was not certified by either the Governor or Secretary of State, of North Carolina, that the attestation was in due form and by the proper officers.

The court overruled this objection, and admitted the copies in evidence. To this ruling, the defendants excepted.

The plaintiffs offered in evidence, the following documentary evidence, with reference to the final settlement of the contract be-

tween said Ambrose B. Stannard and the United States mentioned in the amended complaint and petitions of intervention:

Photographic and certified copies from the Treasury Department (furnished to this court by said department at the request of the court, made in an order with the consent of counsel for all parties) of the following documents, viz:

60 Letter from supervising architect to the secretary of the treasury, dated August 21, 1912, with an endorsement thereon, of the same date, by the secretary of the treasury.

Letter, dated August 23, 1912, from the supervising architect to the custodian of the building, at Aiken, S. C.

Letter dated August 23, 1912, from the supervising architect to A. B. Stannard.

Letter, dated August 24, 1912, from A. B. Stannard, acknowledging receipt of the last mentioned letter.

Voucher, issued by the custodian of the building, dated August 26, 1912, with certificate thereon signed by said Stannard, and approved Sept. 9, 191[illegible]

Disbursing officer's check, No. 10,878 to the order of A. B. Stannard, dated Sept. 11th, 1912, and endorsements thereon.

The plaintiffs also offered in evidence, a letter dated August 31, 1912, from A. B. Stannard to Carolina Electrical Company, Raleigh, N. C., referring to the issuance of voucher to him, as follows:

Ambrose B. Stannard, Contractor.

Aiken, S. C.
Lexington, N. C.

NEW YORK, Aug. 31, 1912.

Carolina Electrical Company, Raleigh, N. C.

GENTLEMEN: I have to acknowledge receipt of your letter of August 28th and state that final voucher has just reached me for P. O. Bldg., Aiken, S. C., and I have signed and returned it to Washington for check, on receipt of which your account will be settled.

I will look up the Lexington account and see what is due you and send you check for that.

I have the plans and specifications here for the extension of Federal building -- your city, and will look for a proposal from you, for your work in that building, and also for the proposed extension of Pensacola, Fla. building.

Very truly yours,

AMBROSE B. STANNARD.

61 The plaintiffs also offered in evidence, department circular No. 45, 1912: with reference to "Claims for Material or Labor in Federal Building Work," dated September 12, 1912, in which the following statement is made by the department viz:

"Final settlement.

"The department treats as the date of final settlement mentioned

in said acts the date on which the department approves the basis of settlement under such contract recommended by the supervising architect, and orders payment acoerding. (So far as known, the correctness of this view as to the true date of final settlement has not been decided by the courts.)"

The defendant, Ambrose B. Stannard when sworn and examined as a witness, testified that the above mentioned checque issued to his order by said disbursing order was received by him in final payment on September 12, 1912.

The foregoing is all the testimony bearing upon the issue when final settlement was had of the contract between said Stannard and the United States.

The plaintiffs offered in evidence exemplified and certified copies of the summons for relief in an action brought by the Hotpoint Electric Heating Company as plaintiff on behalf of itself and all other creditors of the Southern Electrical Company, in the Superior Court, of the State of North Carolina, against Carolina Electrical Company, and proof of service thereof, the petition in said action, and order appointing Joseph B. Cheshire, Jr., permanent receiver, which order reads as follows:

NORTH CAROLINA,
Wake County:

In the Superior Court, October Term, 1912.

HOTPOINT ELECTRIC HEATING COMPANY, on Behalf of Itself and All Other Creditors of the Carolina Electrical Company,
vs.
CAROLINA ELECTRICAL COMPANY.

This cause coming on to be heard before the court upon the petition herein filed, and it appearing to the court that the Carolina Electrical Company, a North Carolina corporation, is insolvent, or in immediate danger of becoming so, its liabilities exceeding its assets, and it further appearing that after advertisement had been duly made for the creditors, stockholders, etc., of the Carolina
62 Electrical Company to appear and show cause why said receivership should not be made permanent and it further appearing that notice was duly served upon said defendant to show cause why said receivership should not be made permanent, and that upon the day named in said notice no one appeared to object to said receivership being made permanent, now, therefore, it is ordered that Jos. B. Cheshire, Jr., be and he is hereby appointed permanent receiver of the Carolina Electrical Company, and upon execution of a good and sufficient bond by said receiver in a surety company authorized to do business in the State of North Carolina in the sum of $5,000.00 dollars he is hereby authorized and empowered to enter upon the discharge of his duties as such permanent receiver and as such is hereby authorized to take charge of all property of the Carolina Electrical Company whether real, personal, chattels or

otherwise, and he is hereby invested with all the rights and powers as receiver according to law.

And the said Jos. B. Cheshire, Jr., as permanent receiver of the Carolina Electrical Company is hereby authorized to sue for any and all debts and obligations owed to the Carolina Electrical Company, and to collect, hold and distribute to the proper parties their part or prorata part of the assets of said defendant. And the Carolina Electrical Company, its officers, stockholders and others interested therein are hereby restrained from transferring or disposing of its property or in any manner interfering therewith or with the permanent receiver until further orders are made in the premises.

And the said Jos. B. Cheshire, Jr., as permanent receiver is hereby authorized and empowered to publish notice in the Raleigh Daily Times, a newspaper published in Raleigh, North Carolina, at least once a week for four weeks, notifying all creditors of the Carolina Electrical Company to file their claims on or before the 1st day of January, 1913, and all creditors and claimants failing to so prove their claims, within said time are hereby barred from participating in any distribution of the assets of said corporation.

And it is further ordered that the Carolina Electrical Company deliver all moneys, properties, choses in action and all other property now in its control and possession to said Jos. B. Cheshire, Jr., as permanent receiver.

G. S. FERGUSON,
Judge Presiding in Sixth Judicial District.

21st October, 1912.

63 The defendants objected to the introduction of these certified copies in evidence, on the ground that they were copies of only a portion of the record in said action, and appear upon their face to be incomplete, and not a statement of all the proceedings had in said cause, and do not show a complete and final judgement in the cause. This objection was overruled, and exception to the ruling taken by the defendants.

The defendants also objected on the further ground that said copy records showed no authority on the part of said receiver to transfer or assign choses of action belonging to the Carolina Electrical Company so as to authorize an action being brought thereon by the assignee in this court.

This objection was considered by the court in passing upon the merits of the case.

Other testimony and evidence was introduced tending to support other allegations of the complaint, petitions of intervention, and answers, in this cause.

At the close of the testimony and taking of evidence, the defendants asked the court to dismiss the action on the grounds:

1. That the testimony and evidence as to the time of final settlement of the contract between Ambrose B. Stannard and the United States, or its officers showed that such settlement was not had six

months before the time of the commencement of this action, March 6th, 1913.

2. That no cause of action having been stated under the statute in the original complaint, nor until the service and filing of the amended complaint, which was more than one year after the final settlement was actually had, the right of action was barred before the commencement of an action under the statute.

This motion was refused, the court holding that the evidence showed final settlement to have been had more than six months before March 6, 1913; and the second ground to be concluded by the order holding that a cause of action under the statute was sufficiently stated to permit the amendment heretofore allowed.

Thereupon the court made, and filed, the following statement of its findings of fact and conclusions of law in the case:

64 *Findings of Fact and Conclusions of Law.*

(Filed Nov. 10, 1913.)

"In the District Court of the United States for the Eastern District of South Carolina.

THE UNITED STATES to the Use and Benefit of J. A. PEELER and Others
versus
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

This is an action brought under the act of Congress of August 13, 1894, as amended by the act of February 24, 1905, giving to subcontractors, under certain circumstances, the benefit of a resort to the bond that the United States may take to secure performance by the principal contractor. The defendant, A. B. Stannard, together with the defendant, Illinois Surety Company, executed a bond on the 7th of July, 1910, in accordance with the statute, to secure the performance by A. B. Stannard of the contract entered into by him with the United States for the construction of a postoffice in the city of Aiken, according to the contract to that effect dated the 5th day of July, 1910. The plaintiffs allege themselves to be subcontractors of the defendant, Ambrose B. Stannard. The building was constructed and completed, and on the 21st day of August, 1912, the treasury department on behalf of the United States stated and determined the final balance to be paid A. B. Stannard in full settlement of the amount to be paid him under the contract at the sum of $3,999.01. The adjustment and determination of the department to this effect was communicated to Stannard, who, on August 24th, acknowledged receipt of the notification, and that a voucher would be issued to him in the amount of $3,999.01 in full settlement. On August 26th, a voucher of that date was prepared by the department showing the balance due Stannard to be $3,999.01, to which voucher Stannard appended his signature certifying that the bill for that

amount was correct. There is no separate date placed to his signature, but the date of the voucher is August 26, 1912. The signature is presumably at the same date, and I find as a conclusion of fact that on August 26, 1912, Ambrose B. Stannard accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under the contract before mentioned. On the 11th of September thereafter a checque for the sum of $3,999.01 was made out by the disbursing clerk of the treasury department payable to the order of Ambrose B. Stannard, who thereafter collected it. Upon the request of the plaintiff herein, viz: the co-partnership styled the Faith Granite Company, the secretary of the treasury on the 16th day of January, 1913 furnished to the plaintiff a certified copy of the contract and bond, and on the 6th day of March, 1913, thereafter, the present action was instituted by the filing of the summons and complaint herein in the office of the clerk of this court, and by service of summons and complaint on defendant Surety Company. Due advertisement appears to have been made as required by the statute upon the institution of this action, and on the 26th of April, 1913, an intervention was filed by E. J. Erbelding, and on the 27th of June, 1913, another intervention was filed on behalf of the firm of Holley & Dyches. No more interventions appear to have been filed in the cause. A motion was made for leave to amend the complaint herein, and was by order of this court filed October 4, 1913, permitted. The cause now being on docket and having been called for trial has been tried, counsel for all parties concerned having first duly waived in writing a trial by jury.

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Upon consideration of the testimony taken, the first point to be settled is that made on behalf of the defendants that this action should be dismissed or judgment rendered for the defendants, upon the ground that it was prematurely brought. That under the terms of the statute it could not be brought until six months after the final settlement of the contract, and that there was no final settlement of the contract until the 11th day of September, 1912, when by finally accepting the checque issued to him in payment of the balance due, Stannard accepted and acknowledged it to be final settlement, and that action having been commenced on the 6th day of March thereafter was commenced before the expiration of six months from the date of final settlement. In the opinion of the court the words "final settlement" as used in the statute do not mean final payment. The word "settlement" does not necessarily in all cases mean payment. The settlement of a debt may mean the payment of the debt, but settlement of a controversy may mean only the ascertainment of the amount to be paid whether it be ever paid or not. Under the present statute a final settlement may not mean payment. If the contractor should finally fail in his contract and the work be completed by the United States, and the contractor be due under the contract for payment to the United States of the cost of completion, which balance in case of the insolvency of the principal contractor might never be paid, then if final settlement meant payment

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there could be said to have been never any final settlement. I construe the words "final settlement" to mean a final adjustment and determination either by contractual agreement of the parties or by proper judicial proceedings of the final results of the operation under the contract, so as to finally determine the balance or result on whichever side it may be. In the present case I find as a conclusion of fact that that final adjustment and settlement in the meaning contemplated by the statute was had on the 26th of August, 1912, and that the present action therefore was not brought before the expiration of six months from the date of final settlement. Such being the case, and no action having been instituted by the United States upon the bond within the six months permitted by the statute, the present action appears to have been properly instituted within the period permitted by the statute. I find further as a conclusion of fact, based upon the construction of the statute hereinbefore given, that the interventions filed have both been filed subsequent to the expiration of six months before the final settlement, and anterior to the expiration of one year therefrom, and have been properly filed within the period permitted by the statute. This finding of fact and law makes it unnecessary to consider the question whether or not, even if this action had been commenced within six months, the objection would not have been one going only in abatement and not in bar to the action, and also whether if the original proceeding or action instituted by the plaintiff had been filed prematurely that would affect the intervenors who filed their interventions subsequent to the expiration of the six months.

The testimony on behalf of all the parties discloses that there are three separate claims sought to be proven in this case. The first is the claim preferred by the firm known as Faith Granite Company. I find as a conclusion of fact that they have shown that their original contract called for a payment of $3,625.00; that they performed that work, and also furnished additional material and labour under the orders of the defendant, Stannard, to the amount of $204.05,
67 making a total of $3,829.05. From this must be deducted first the sum of $482.25, freight bills paid by the defendant, Stannard, and which under the contract were to have been paid by the Faith Granite Company. In addition to this the testimony discloses that there were certain delays due to the failure of the Faith Granite Company to perform its contract with that reasonable promptness and diligence that I find was entailed upon it by the terms of the contract between the Faith Granite Company and Stannard. I find further that much of that delay was caused by the insufficient preparation of the granite material in that it was not prepared in accordance with the terms of their contract, and that their failure to do so delayed the principal contractor in the execution of his work. The exact extent of this delay it is hard definitely to ascertain from the testimony. The Government Inspector, Flinn, testified that at the minimum it was sixty-five days, and the total delay in the completion of the contract was ten months and three days beyond the contract time. The entire liquidated damages for

the delay of ten months and three days was not enforced by the government, but there was enforced against Stannard by the government a deduction for certain actual expenses incurred by the government estimated as being the expenses for 149 days aggregating $792.61. The most definite figure that can be given in estimating the proportion of the delay due to the Granite Company would be testified to have been caused by it according to the proportion it bears to the entire delay of ten months and three days, which I find to be one fifth. I find that the entire expenses due to this delay under the uncontradicted testimony of Ambrose B. Stannard was $1,502.07, of which one-fifth, or $300.51, I find as a conclusion of fact was occasioned by the Faith Granite Company. Adding to $300.51 the sum of $482.25 for freight bills, makes a total of $782.76, which deducted from the total of $3,829.05 leaves a balance of $3,046.29, which I find the plaintiffs, the Faith Granite Company are entitled to recover in this action from the defendant the Illinois Surety Company herein.

The next claim is that on the part of the intervenor, E. J. Erbelding, who has testified to a contract on which all the work was performed of $3,950.00, on the amount of which he has been paid $1,675.00, leaving a balance of $2,275.00. To that is to be further added the sum of $87.60 for additional labour and material furnished to Stannard upon his order, and to be deducted the
68 sum of $10.00, which was deducted by the government inspector, which would leave a balance of $2,352.60. From this amount the defendant, Stannard claims a deduction by reason of delay also on the part of Erbelding. This delay is denied by Erbelding himself, and his employee, Babbitt, and rests upon the testimony of A. C. Wyckoff, the superintendent employed by Stannard himself. The testimony of Wyckoff does show some delay taken by itself, but is too indefinite for any ascertainment of the amount due to that delay, and taken in connection with positive statements of the witnesses on the other side, I must hold that the performance of his contract without delay having been proven by the preponderance of the testimony, I therefore find that the intervenor, E. J. Erbelding, is entitled to recover the sum of $2,352.60 from the defendant, Illinois Surety Company, in this case. The last intervention is that of Holley & Dyches, who proved the performance of labour by way of hauling and for some material furnished to the amount of $500.71. No charge of delay in testimony is made or proven against them, and I find that the intervenors Holley & Dyches are entitled to recover from the defendants herein the sum of $500.71. The original plaintiff herein has preferred and proved a claim upon behalf of the Carolina Electric Company for the sum of $498.69. No testimony showing that there was any delay on the part of the Carolina Electric Company has been adduced, and I find that there has been proven on behalf of the Carolina Electric Company a good claim against the defendant, A. B. Stannard under its contract for the sum of $498.69. It is objected, however, to this claim that it is not sufficiently proven that the Carolina Electric Company was a corporation under the laws of North Carolina, nor

has it been sufficiently proven that the party purporting to be the receiver of that company had the right to assign it to the Electric Engineering and Contracting Company, to whose incorporation it is likewise objected that it is insufficiently proven. I hold as a conclusion of fact that the certificates introduced under the great seal of the State of North Carolina sufficiently proves the incorporation of those two companies, but I find that the order proven in the cause as the authority for the receiver of the Carolina Electric Company to assign their claim to the Electric Engineering and Contracting Company is not sufficient authority for it. As, however, the statute permits any intervenor to come in without any precise regu-
69 lation of form other than a creditor may file his claim and be made a party hereto, I hold that the proceeding in this case is a sufficient filing of the claim on behalf of the Carolina Electric Company, and that such company is entitled to recover the amount above stated, judgment when awarded to be in the name or for the benefit of the Carolina Electric Company, and to be paid only to such person as may be authorized by law to receive it for them.

The defendant, A. B. Stannard has filed his certificate of discharge in bankruptcy in due form as having been granted by the U. S. District Court for the Southern District of New York. This discharge releasing him from all debts prior to the 10th of May, 1913, in which category all the claims proved herein fall, no judgment under this finding can be entered or enforced against the defendant, A. B. Stannard. Interest upon the claims herein adjudged is recoverable from the date of this order only.

HENRY A. M. SMITH,
U. S. Judge for S. C.

November 10, 1913.

Judgment.

Filed December 8, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Upon and in accordance with the findings of fact and conclusions of his honor, Henry A. M. Smith, United States judge, made and filed herein bearing date November 10, 1913, it is

Adjudged, That the plaintiffs, J. A. Peeler, L. M. Peeler
70 and P. A. Peeler, partners trading under the firm name of Faith Granite Company, have judgment against the defend-

ant, Illinois Surety Company for the sum of three thousand and forty-six and 29/100 ($3,046.29) dollars, which sum bears interest from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and ninety-one hundredths ($29.91) dollars, costs.

That Carolina Electrical Company have judgment against the defendant, Illinois Surety Company for the sum of four hundred and ninety-eight, and 69/100 ($498.69) dollars, with interest thereon from November 10, 1913, at the rate of seven per cent. (7%) per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs. Said judgment to be paid only to such person as may be authorized by law to receive it for said Carolina Electrical Company.

That the intervenor, E. J. Erbelding, have judgment against the defendant, Illinois Surety Company for the sum of twenty-three hundred and fifty-two and 60/100 ($2,352.60) dollars, together with interest thereon from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs.

That the intervenors, B. F. Holley and W. P. Dyches, composing the firm of Holley & Dyches, have judgment against the defendant, Illinois Surety Company for the sum of five hundred and 71/100 ($500.71) dollars, with interest thereon from November 10, 1913, at the rate of 7% per annum, and in addition thereto twenty-nine and 91/100 ($29.91) dollars, costs.

D. W. ROBINSON,
Attorneys for Plaintiffs and for Intervenors.

Signed, sealed, entered and enrolled the 8th day of December, 1913.

EDWARD W. HUTSON, [SEAL.]
C. D. C. U. S. S. C.

The defendants excepted to the foregoing findings of fact and conclusions of law, on the grounds that the court erred:

(*a*) In holding and concluding as matters of law, that the term "final settleem-nt" in the statute in question means a final adjustment and determination, either by contractual agreement of
71 the parties or proper judicial proceedings, of the final results of the operations under the contract so as to finally determine the balance due; and not the final payment by the government in discharge of its liabilities under the contract.

(*b*) In finding and concluding as matter of fact, from the evidence above stated, that the "final settlement" contemplated by the statute was had in this case on the 26th of August, 1912, the date of the voucher prepared by the government, and certified by Stannard as correctly stating the balance due him under the contract; and that said Stannard then accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under said contract; and in therefore, finding further and conclud-

ing that this action commenced March 6, 1913, was not brought prematurely or before the expiration of six months from the date of final settlement.

(*c*) In holding and concluding, that it was unnecessary to consider the question whether or not, even if this action had been commenced within the period of six months from the date of final settlement, the objection would not have been one going only in abatement, and not in bar to the action.

(*d*) In not finding as matter of fact, from the undisputed evidence in this case, that the final settlement of the contract between Stannard and the United States was had either on September 9, 1912, when the voucher was approved for payment, as per endorsement stamped thereon, or on September 11, 1912, when the cheque was issued and accepted by Stannard in payment and discharge of the liability of the United States under said contract.

(*e*) In not holding and concluding that the bringing of this action was unauthorized under the statute, on March 6, 1913, when it was commenced, and that it should therefore be dismissed.

(*f*) In holding and concluding that it was unnecessary to decide whether or not, if this action had been prematurely commenced by the plaintiffs within six months from the date of final settlement,
72 that would affect the intervenors who filed their interventions subsequent to the expiration of the six months; and in not holding and concluding that the intervenors in the action took it as they found it, and are in no better position than the original parties thereto.

(*g*) In holding and concluding that the certified copies of the articles of incorporation, or charters, under the hand of the secretary of State of North Carolina, and the great seal of that State, were admissible in evidence, and in failing to exclude the same.

(*h*) In holding and concluding that judgment could be awarded in this action in favor of the Carolina Electrical Company, when that company was not a party to, and had not intervened in this action.

(*i*) In not holding that the rights of the plaintiffs, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

(*j*) In not holding that the rights of Holley & Dyches, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended petition of intervention, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

(*k*) In not holding that the rights of E. J. Erbelding, if any upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended petition of intervention which was served more than one year after the date of the final settlement of

the contract between Stannard and the United States. On the same day, October 10, 1913, orders were made and granted by the presiding judge extending the time for formal preparation and presentation to the court and for serving and filing of the bill of exceptions and assignment of errors for thirty days from said date.

73 And, therefore, the defendant, Illinois Surety Company, by its counsel, prays that this bill of exceptions may be allowed, signed, settled and sealed.

W. H. TOWNSEND,
Attorney for Illinois Surety Company, Defendant.

Service of the foregoing bill of exceptions is hereby accepted and acknowledged to have been made upon us this 2nd day of December, 1913; and we have no amendments to propose to the same.

D. W. ROBINSON,
Counsel for Plaintiffs and for Intervenors.

The foregoing bill of exceptions is correct in all respects, and is hereby approved, allowed, signed, settled and sealed, and made a part of the record herein, this 10th day of December, 1913.

HENRY A. M. SMITH,
United States Judge for the District of South Carolina.

74 *Assignment of Errors.*

Filed Dec. 10, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm-name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, Intervenor; B. F. Holley and H. P. Dyches, Partners Trading under the Firm-name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Now comes the defendant, Illinois Surety Company, and respectfully represents that it feels aggrieved by the proceedings of the District Court of the United States for the District of South Carolina in the above entitled cause, and, in connection with its petition for writ of error herein, makes the following assignments of error, to-wit:

1. That said court erred in refusing the motion to dismiss the original complaint, together with the original petitions of interven-

tion, served and filed in this action, and in holding and concluding as matter of law:

(*a*) That the limitations in the statute (act of Congress, of February 24th, 1905, 33 Stat. at Large 811, chapter 778, amending act of August 13th, 1894, 28 Stat. at Large 278, chap. 280) as to the time within which the action given by the statute must be brought, so far as the surety on the bond of the original contractor is
75 concerned, were only intended to protect such surety from the inconveniences of being sued in separate harassing actions, and of called to respond for the acts of its principal after the lapse of too deferred a period; and

(*b*) That the conditions that there should have been a completion of the contract and final settlement with the United States, and that the action given by the statute be brought within the six months permitted by the statute, are not essential elements of the original benefit created by the statute, and are no part of the fundamental right of action given by the statute; and

(*c*) That the failure to allege the occurrance of these conditions is not a failure to allege a cause of action under the statute; and

(*d*) That the allegation in the complaint that the plaintiff had made the affidavit required by the statute and procured from the assistant secretary of the Treasury a certified copy of the original contract and bond, was in effect an allegation of the existence of the conditions required by the statute as a prerequisite to the bringing of the action; and

(*e*) That a cause of action under the statute was sufficiently pleaded in the original complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect, by way of amendment; and

(*f*) That the original petition of intervention filed on behalf of E. J. Erbelding alleged a cause of action under the statute on behalf of said intervenor; and

(*g*) That the petition of intervention filed on behalf of Holley & Dyches alleged a cause of action under the statute on behalf of said intervenors.

And that the said court further erred in not holding and concluding as matter of law, that the original complaint stating no cause of action under the statute, there was no action under the statute pending in this court upon the filing of said complaint, and that the petitions of intervention thereafter filed should be dismissed because not filed in an action under the statute pending in said court.

76 2. That said court erred in granting the plaintiffs on October 4th, 1913, leave to amend the original complaint so as to make it more ample and sufficient in all respects by the addition of complete allegations as to the existence of the conditions required by the statute at the time of the commencement of the action, in that no cause of action being alleged in the complaint there was nothing to amend by, and the period limited by the statute with- which the action should be brought had expired at the time such amendment was allowed.

3. That said court erred in granting the intervenors on October 4th, 1913, leave to amend their respective petitions of intervention so as to allege the existence of the prerequisites to the maintenance of the action at the time of its commencement, in that (*a*) no action under the statute was pending at the time of the filing of said petitions, and (*b*) the original petitions of intervention stated no cause of action under the statute, and (*c*) the time within which such action might have been instituted, or petition of intervention filed under the statute, had expired when said order was made granting leave to amend.

4. That the said court erred in admitting in evidence the certified copies of the articles of incorporation, or charters, of the Engineering and Contracting Company and of the Carolina Electrical Company, in that the same were not exemplified as required by section 906 of the Revised Statutes of the United States, there being no certificate by the secretary of state or by the governor of the State of North Carolina that the attestation to said copies was in due form.

5. That the court erred in admitting — evidence the exemplified copy of the record from the Superior Court for Wake county, North Carolina, in the case of the Hot Point Electric Heating Company against Carolina Electrical Company, in that the same was only a partial record in a judicial proceeding and did not show a final judgment.

6. That said court erred in holding and concluding as matter of law that the term "final settlement" in the statute in question means a final adjustment and determination, either by contractual agreement of the parties or proper judicial proceedings, of the final
77 results of the operations under the contract so as to finally determine the balance due; and not the final payment by the government in discharge of its liabilities under the contract.

7. That said court erred in matter of law in finding and concluding from documentary and undisputed evidence in this cause that the final settlement contemplated by the statute was had in this case on the 26th of August, 1912, the date of the voucher prepared by the government, and certified by Stannard as correctly stating the balance due him under the contract; and that said Stannard then accepted the adjustment made and proposed by the government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the government for his work under said contract; and in therefore finding and concluding that this action commenced March 6th, 1913, was not brought prematurely or before the expiration of six months from the date of final settlement.

8. That said court erred in holding and concluding as matter of law that it was unnecessary to consider the question whether or not, even if this action had been commenced within the period of six months from the date of final settlement, the objection would not have been one going only in abatement, and not in bar to the action; and in not holding and concluding that the premature commencement of the action within six months from the date of final settlement would be, and was, a bar to the action under the term of the statute.

9. That said court erred in matter of law in not finding as matter of fact and concluding from the documentary and undisputed evidence in this case that the final settlement of the contract between Stannard and the United States was had either on September 9th, 1912, when the voucher was approved for payment, as per endorsement stamped thereon, or on September 11th, 1912, when the checque was issued and accepted by Stannard in payment and discharge of the liability of the United States under said contract.

10. That said court erred in not holding and concluding under the undisputed evidence in this action that the bringing of this action was unauthorized under the statute *under the statute*, on March 6th, 1913, when it was commenced, and that it should therefore be dismissed.

78 11. That said court erred in holding and concluding that judgment could be awarded in this action to, or for the benefit of, the Carolina Electrical Company, although that company was neither a party to, nor had intervened in, this action.

12. That said court erred in not holding and concluding that the rights of the plaintiffs, if any, upon the bond in question, were barred under the statute inasmuch as no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

13. That said court erred in holding and concluding that the question whether or not the rights of the plaintiffs, if any, under the bond in question, were barred under the statute on the alleged ground that no cause of action under the statute was stated to the court until the service of the amended complaint, which was served more than one year after the date of the final settlement of the contract between Stannard and the United States, was precluded from consideration upon the hearing of the case on its merits by the ruling of the court in its order permitting the service of the amended complaint.

14. That said court erred in not holding and concluding that the rights of Holley & Dyches, if any, upon the bond in question, were barred under the statute, inasmuch as no cause of action under the statute was stated to the court in their favor until the service of the amended petition of intervention, which was served more than one year after the date of final settlement of the contract between Stannard and the United States.

15. That said court erred in not holding and concluding that the rights of E. J. Erbelding, if any, upon the bond in question, were barred under the statute, inasmuch as no cause of action under the statute was stated to the court in their favor until the service of their amended complaint, which was served more than one year after the settlement of the contract between Stannard and the United States.

79 16. That said court erred in holding and concluding that the right of action given by the statute to subcontractors, laborers and material men was at law rather than in equity.

Wherefore, the said Illinois Surety Company prays that the said judgment of the District Court of the United States for the District of South Carolina be reversed, and the case remanded to that court with instructions to enter a judgment for this defendant therein.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.

Bill of Exceptions of Plaintiffs and Intervenors.

Filed December 10, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Be it remembered, that on the 10th day of November, 1913, the above entitled cause came on for trial before the above court, a jury trial having been waived by stipulation filed herein, the same was tried by his honor Henry A. M. Smith, presiding judge. The plaintiffs and intervenors appeared, by their attorneys, John L. Rendleman, Pierce Brothers, Croft & Croft and D. W. Robinson, and the defendants, by their counsel, W. H. Townsend, and the following proceedings were had:

The pleadings were read and the evidence taken, and thereupon the court made its order embracing its findings of fact and conclusions of fact and of law, which is fully set forth in the record.

80 1. And in and by said order the court found and concluded as follows: "Interest upon the claims herein adjudged is recoverable from the date of this order only."

To which said ruling of the court counsel for plaintiffs and for intervenors duly excepted, because the undisputed testimony showed, and the court found, that the defendant Stannard received full and final payment under his contract on September 11, 1912, and from said date the plaintiffs and intervenors were entitled to interest on their respective debts and claims against the said Stannard.

And the plaintiffs and intervenors hereby tender their bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same. The record and bill of exceptions as settled on the writ of error applied for by the Illinois Surety Co. being included as a part of this bill of exceptions.

HENRY A. M. SMITH. [L. S.]
U. S. Judge.

December 10th, 1913.

Assignment of Errors.

Filed Dec. 10, 1913.

In the District Court of the United States for the District of South Carolina, at Columbia, S. C.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company,

vs.

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

Comes now the plaintiff Faith Granite Company, Electrical & Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, and intervenors, E. J. Erbelding and B. F. Holly and H. P. Dyches, composing the firm of Holly & Dyches, and file the following assignment of errors upon which it will rely upon its presentation of the writ of error in the above entitled cause
81 from the order and rulings made by this honorable court on the 10th day of November, 1913, in the above entitled cause:

1. That the United States District Court in and for the Eastern District of the State of South Carolina, Fourth Circuit erred in its findings and ruling that "interest upon the claims herein adjudged is recoverable from the date of this order only"; because the evidence and findings show that the defendant Stannard, the principal contractor, received full payment under his contract on September 11, 1912, for all work done under the contract sued on herein and from that date he had the use and benefit of the moneys due to plaintiffs and intervenors, as subcontractors, and the said defendant and the surety on his bond, to-wit, the defendant Illinois Surety Company, should have been and were liable to said plaintiffs and said intervenors for interest from said date on their respective debts.

Wherefore, the said plaintiffs and intervenors pray that the judgment of said court be reversed and modified in regard to the said interest and that such direction be given that full force and efficacy may inure to said plaintiffs and intervenors by reason of the matters set up in this complaint in this case.

D. W. ROBINSON,
Attorney for Plaintiffs and Intervenors.

Dec. 2, 1913.

82 *Stipulation as to Making up of Record and Sending up Original Exhibits.*

Filed Dec. 10, 1913.

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding, and B. F. Holley and H. P. Dyches, Partners, Trading under the Firm Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

It is hereby stipulated between the above named plaintiffs and intervenors, by their attorneys, and the Illinois Surety Company, defendant, by its attorney, that the transcript of the record in the above entitled cause, shall be made up by the clerk of this court, so as to include the bills of exceptions for both plaintiffs and defendants, (which contains so much of the record including the pleadings, notice of motion, and orders filed in the cause, as are relevant to the questions to be reviewed on writ of error) and the assignments of error.

The formal judgment entered in this court in said cause on the — day of November, 1913, need not be included in the transcript and printed record. It being admitted that the same was regularly entered in accordance with the findings and conclusions of the court made November 10th, 1913, and set out in the Bill of Exceptions.

It is further stipulated that this court may make an order directing that in addition to the transcript of record on appeal in this action, the clerk of this court transmit to the clerk of the United
83 States Circuit Court of Appeals at Richmond, Va., the following original papers in this action, to be by him safely kept and returned to this court upon the final determination of this action in said Court of Appeals, namely:

The photographic and certified copies of letters from supervising architect to the Secretary of the Treasury, dated August 21st, 1912, with endorsement thereon by the Secretary of the Treasury; letter from Supervising Architect to Custodian of postoffice building at Aiken, S. C., dated August 23rd, 1912; letter from Supervising Architect to A. B. Stannard, dated August 23rd, 1912; letter from A. B. Stannard, dated August 24th, 1912; voucher issued by custodian of building, dated August 26th, 1912, with certificate by Stannard and other endorsements thereon; disbursing officer's checque, No. 10,878, to the order of A. B. Stannard, dated Sept. 12th, 1912, and endorse-

ments thereon, which copies were furnished by the Treasury department to the judge of this court.

Also, original letter from A. B. Stannard to Carolina Electrical Co., of Raleigh, dated August 31st, 1912, introduced in evidence by plaintiffs.

It is further stipulated that said transcript of record made up by said clerk, be printed in accordance with Rule 23 of said Circuit Court of Appeals.

W. H. TOWNSEND,
Attorney for Illinois Surety Co., Defendant.
D. W. ROBINSON,
Attorneys for Plaintiffs and Intervenors.

Columbia, S. C., December 2, 1913.

84 *Order to Transmit Record.*

Filed Dec. 10, 1913.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the District Court of the United States for the District of South Carolina.

UNITED STATES to the Use and Benefit of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, Plaintiffs; E. J. Erbelding and B. F. Holley and H. P. Dyches, the Last Two Named Being Copartners, Doing Business under the Firm Name of Holley & Dyches, Intervenors,

against

AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

On motion of W. H. Townsend, attorney for Illinois Surety Company, defendant:

It is ordered, that a transcript of the record and proceedings in the above entitled case be made up by the clerk of this court, together with all things thereunto relating, in accordance with the stipulation signed by the attorneys for the parties and filed herewith, and be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit.

It is further ordered, that in addition to said transcript of the record on appeal in this action, the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals at Richmond, Virginia, the following original papers in said action, to be by him safely kept and returned to this court upon the final determination of this action in said Court of Appeals, namely: The photographs and certified copies of letters from supervising architect to the secre-

tary of the Treasury, dated August 21st, 1912, with endorse-
85 ment thereon by the secretary of the Treasury; letter from supervising architect to custodian of the post-office building at Aiken, S. C., dated August 23rd, 1912; letter from supervising architect to A. B. Stannard, dated August 23rd, 1912; letter from A. B. Stannard, dated August 24th, 1912; voucher issued by custodian of building, dated August 26th, 1912, with certificate by Stannard, and other endorsements thereon; disbursing officer's cheque, No. 10,878, to order of A. B. Stannard, with endorsements thereon; which copies were furnished by the Treasury Department to the judge of this court.

Also, original letter from A. B. Stannard to First National Bank of Salisbury, N. C., dated August 31st, 1912, introduced in evidence by plaintiffs.

HENRY A. M. SMITH,
United States Judge for the District of South Carolina.

December 10, 1913.

Memorandum.

Petition of defendant for writ of error and allowance of writ of error, filed December 10, 1913.

Writ of error, issued and filed December 10, 1913.

Copy of writ of error lodged for adverse party, December 10, 1913.

Supersedeas bond, filed December 10, 1913.

Penalty, $7,500.00.

Obligors: Illinois Surety Company, principal, and Equitable Surety Company, surety.

Conditioned for damages and costs.

Citation filed December 10, 1913.

Service waived December 3, 1913.

Petition of plaintiff and intervenors for writ of error and allowance of writ of error, filed December 10, 1913.

Writ of error, issued and filed January 8, 1914.

Copy of writ of error lodged for adverse party, January 8, 1914.

Appeal bond, dated — December, 1913.

Penalty, $250.00.

Obligors: J. A. Peeler, L. M. Peeler and P. A. Peeler, composing the firm of Faith Granite Company, principal, and United States Fidelity & Guaranty Company, surety.

Conditioned for costs.

Citation filed January 8, 1914.

Service waived December 9, 1913.

86 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of South Carolina:

In the District Court.

I, Richard W. Hutson, clerk of the District Court of the United States for the District of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records and proceedings in the case of United States, to the use and benefit of J. A. Peeler, and others, plaintiffs, against Ambrose B. Stannard and Illinois Surety Company, defendants, and E. J. Erbelding and Holly & Dyches, intervenors, together with the judgment and all papers relating to the same, as stipulated by counsel, and as appears by the record now on file in my office.

Given under my hand and seal of said court, at Charleston, S. C., in the district aforesaid, this 7th day of January, A. D. 1914.

[SEAL OF COURT.] RICHARD W. HUTSON,
C. D. C. U. S., S. C.

87 & 88 On the same day, to-wit: January 9, 1914, the original petition for a writ of error, order allowing writ of error, writ of error, writ of error bond, and citation; and the cross-petition for a writ of error, order allowing cross-writ of error and cross-writ of error, cross-writ of error bond and cross-citation, are certified up to this Court in pursuance of Sec. 7 of Rule 14.

Same day, appearance of W. H. Townsend is entered for the plaintiff in error and cross-defendant in error.

Same day, appearance of D. W. Robinson, John L. Rendleman, Pierce Bros., and L. E. Croft, is entered for the defendants in error and cross-plaintiffs in error.

Stipulation to Place Case at Foot of Docket and Argue at February Term, 1914.

Filed January 9, 1914.

UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

UNITED STATES to the Use and Benefit of FAITH GRANITE COMPANY et al.
vs.
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY.

89 & 90 It is stipulated by and between the above entitled Plaintiffs and Defendants, that this cause shall be entered upon

the docket of the Circuit Court of Appeals by the Clerk thereof at once, for hearing at the February Term of said Court. There is an appeal (Writ of Error) by Plaintiff and also by Defendant in this cause.

Dec. 26, 1913.

D. W. ROBINSON,
Of Counsel for Plaintiffs and Intervenors.
W. H. TOWNSEND,
Attorney for Defendants.

January 12, 1914, original exhibits (photographic letters, etc.) certified up.

Stipulation as to Filing Briefs.

Filed January 22, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES to the Use and Benefit of J. A. PEELER et al.,
Plaintiffs,
vs.
AMBROSE B. STANNARD and ILLINOIS SURETY COMPANY, Defendants.

Cross-Appeals.

In the above entitled action, it is agreed by and between counsel for Plaintiffs, Intervenors and Defendant, subject to the approval of the Court:

That the requirement of Rule 24, in regard to the printing and filing of copies of brief for each of the respective parties herein, shall be dispensed with, and that any party to this action may file such brief at any time prior to the call of the case for hearing.

Jan. 14, 1913.

D. W. ROBINSON,
Of Counsel for Plaintiffs and Intervenors.
W. H. TOWNSEND,
Attorney for Defendant, Illinois Surety Company.

91 & 92 Same day, twenty-five copies of the printed record are filed.

March 4, 1914, (February Term 1914), cause came on to be heard before Knapp and Woods, Circuit Judges, and Dayton, District Judge, and is argued by counsel and submitted.

May 6, 1914, (May Term 1914), the Court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed May 6, 1914.

93 United States Circuit Court of Appeals, Fourth Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-Defendant in Error,

versus

UNITED STATES to the Use of J. A. PEELER et al., Trading as Faith Granite Company et al., Defendants in Error and Cross-Plaintiffs in Error.

Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia.

[Argued March 4, 1914. Decided May 6, 1914.]

Before Knapp and Woods, Circuit Judges, and Dayton, District Judge.

W. H. Townsend for plaintiff in error and cross-defendant in error, and Benjamin E. Pierce and D. W. Robinson (J. L. Rendleman, Pierce Bros., and Croft & Croft on brief) for defendants in error and cross-plaintiffs in error.

KNAPP, *Circuit Judge:*

This suit was commenced on March 4, 1913, under the Act of Congress of August 13, 1894, as amended February 24, 1905,
94 which gives to sub-contractors under certain conditions a right of action upon the bond of a contractor for the erection of a public building. For convenient reference the material parts of this statute are reproduced in the margin.*

* "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials, shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action and shall be, and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or

The defendant contractor and his surety, the plaintiff in error, filed separate answers to the complaint on April 4, 1913. Notice was published as provided by the Act, and two other sub-contractors intervened, one on April 26, and the other on June 27, 1913. On the 22nd of September, 1913, the defendants filed notices of motion, in the nature of a demurrer, to dismiss the complaint, and also the petitions of intervention, on specified grounds which were in effect that neither the complaint nor the petitions stated a cause of action. It was also alleged that the court had no jurisdiction because the right of action is equitable in its nature and the issues cannot be determined in a suit at law. Upon the hearing of these motions the plaintiffs and interveners asked for and received leave to amend. Amended pleas were thereupon filed, to which answers were duly interposed by the defendants. The contractor set up a special defense, which was sustained, that he had been adjudicated a bankrupt and received his discharge. The case was tried by the District Judge,
95 all parties having stipulated in writing to waive a trial by jury and resulted in a judgment against the plaintiff in error, and in favor of the several sub-contractors mentioned, both plaintiffs and interveners. To reverse this judgment the surety company prosecutes this writ of error. The cross-writ alleges error because interest was allowed only from the date of the order directing the judgment.

Apart from some minor issues which will be later considered, the two principal contentions are, first, that the action was prematurely brought and must fail for that reason, and, second, that the trial court erred in allowing the complaint and petitions to be amended. If the first of these contentions is well founded the case is at an end, as the Supreme Court has recently held in United States v. McCord, et al., decided April 6, 1914. The point was directly involved, and the decision unequivocal. Among other things, the court says:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six

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their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability became a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself.

* * * * * * *

"The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the
96 creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

In the case at bar the facts relating to the commencement of the action are these: The work required of the contractor appears to have been practically completed some time in June, 1912. The Supervising Architect so reported in a communication to the Secretary of the Treasury, under date of August 21, 1913, which contains "a condensed statement of the account," including contract price, additions and deductions made from time to time, payments on account, and charges of actual damages for delay, and recommends that authority be given "for the issue and payment of a voucher" in favor of the contractor for $3,399.01, the balance found due to him. On the same date this statement and recommendation were approved by the Assistant Secretary of the Treasury. Under date of August 23, the contractor was notified of the amount so stated and determined to be due him, and that authority had been given for a voucher in his favor for the ascertained balance, and he acknowledged the same two days later by letter to the Supervising Architect. The voucher was issued on August 26, and he signed his approval thereof on or about that date. The check in payment was drawn on the 11th of September, and paid on the following day. This check, as will be seen, was issued and paid less than six months before the suit was commenced, and if that be the date of the "completion and final settlement" of the contract, within the meaning of the statute, the action was prematurely brought and cannot be maintained.

But we are clearly of opinion that the final settlement in this case was effected on or before the 26th of August, when the contractor signed the voucher which bears that date, and in which he certified "that the above bill is correct and just and that payment therefor has not been received." Surely, nothing then remained to be settled. Indeed, there is no indication in the record that anything had

been in dispute between the contractor and the Government.
97 There was no disagreement as to the additions to the work for which he was entitled to additional pay, or as to deductions for items not furnished. Under the penalty clause of the contract the Government had the right to make a further and large deduction for delay in completing the work, and the contractor was of course aware that this could be done. The Government, however, was satisfied to charge against this accumulated penalty only such actual expenses as had been occasioned by the delay, and the contractor was presumably well satisfied with what was done in that regard. At any rate, he accepted the basis of settlement proposed without question or demur, and promptly signed the voucher which stated the account in detail on that basis, and contained a certificate that the bill was just and correct. The contract had been performed, the work accepted, the balance ascertained, which the Government admitted he was entitled to receive, and he assented unreservedly to the settlement which the Government offered. If there can be a settlement of a contractor's claim without payment of the balance due him, which we do not at all doubt, there was a complete and final settlement of the contract in question. The circumstance that something over two weeks elapsed before a check was made out for the balance agreed upon does not in the least alter the fact that the settlement was complete when the contractor signed and returned the voucher. In our opinion the learned District Judge was entirely correct in his conclusion that this suit was not brought until more than six months after the final settlement of the contract.

This accords with the construction of the statute by the Treasury Department, as appears from a regulation which reads as follows:

"The department treats as the date of final settlement mentioned in said acts the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly."

It is familiar doctrine that the construction given to a statute by officials charged with its administration will be upheld by
98 the courts unless convincing reason to the contrary is found in the language or purpose of the enactment.

New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S., 361, 401.

We have discovered only two cases under this statute which bear directly upon the point here considered, and both of them give support to the views above expressed.

United States v. Winkler, 162 Fed., 397.
United States v. Bailey, 207 Fed., 782.

In the latter case, District Judge Bourquin, after reciting the steps taken in the adjustment and settlement of contractors' accounts, uses the following language:

"When this is done and not until then, in respect to government contracts performed, there is final settlement thereof, though further time be necessary for mere ministerial acts, to issue and deliver

warrants. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act February 24, 1905, aforesaid. And from the date of said auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced, begins to run."

The other contention above mentioned alleges error in the allowance of amendments to the pleadings after the expiration of a year from the date of the final settlement of the contractor's account. The original complaint did not allege in terms that there had been a completion of the contract and final settlement thereof between the Government and the contractor; nor did it allege when the contract was completed and final settlement had; nor that such completion and final settlement occurred more than six months, and within a year, before the date of the commencement of the suit. Similar omissions or defects appear in the original petitions of intervention.

We are unable to see any substantial reason why the discretionary power of the court to allow amendments could not be exer-
99 cised because the time within which the suit could be begun had then elapsed. The suit was in fact commenced, as we hold, more than six months and less than a year after the final settlement referred to in the statute. At that time a complete cause of action under the act existed in favor of the plaintiffs. By some mistake or inadvertence they failed, as we will assume, to set forth in their complaint all the facts necessary to establish their cause of action, although the omitted facts actually existed. Why should they be deprived of the benefits conferred by this statute, when their action was seasonably brought and the facts entitled them to recover, merely because through some mischance certain of those facts were omitted from their complaint? Why should not the court permit the omissions to be supplied, and upon what sustainable theory can it be said that the court was powerless to grant relief after the time limited for commencing the action had expired? The amended complaint sets up no new cause of action, and alleges no facts which were not in existence when the suit was begun; it merely supplies omissions and corrects defects in the original complaint. If the suit had been prematurely brought, or brought too late, the court would have been without jurisdiction, because under those circumstances the plaintiffs would not be within the conditions of the statute and therefore could not avail themselves of its provisions; and no amendment would be of value in that case because there would be nothing to amend, as the Supreme Court says in the recent case above cited. But this suit was commenced within the period allowed by the act, and the right of recovery depends upon the state of facts which existed at that time. It is elementary that an amendment dates back to the beginning of the suit and is designed to cure defects in the statement of the cause of action then existing, and there is abundant precedent for permitting amendments of that character and for that purpose, to the end that errors or mistakes of pleading may not result in a miscarriage of justice.

In our judgment the amendments in question were properly allowed under the provisions of sections 954 of the Revised Statutes, and the authority of M. K. & T. Ry. v. Wulf, 226 U. S., 576.

The remaining assignments of error do not go to the merits of the controversy and need but a word of mention. Whether
100 the action authorized by the statute in question is an action at law or in equity seems to us of no practical importance in this case, and therefore requires no discussion, because both parties duly waived a trial by jury and thereby in effect requested the court to try the case without a jury. Under those circumstances no reversible error was committed, even if it be assumed that the cause should have been placed on the equity calendar and not on the law calendar.

We agree with the trial court that the incorporation of the Carolina Electric Company and the Electrical Engineering & Contracting Company was sufficiently proved by the certificates received in evidence. There was no dispute as to the fact or amount of the contractor's indebtedness to the former company, and the obligation of the plaintiff in error to pay the same was properly established. The direction to pay the sum found due "to such person as may be authorized by law to receive it" gives adequate protection to the plaintiff in error and appears to be a suitable disposition of the case in that regard.

We are also of opinion that the learned District Judge was right in allowing interest only from the date of the order awarding judgment, because the amounts due the respective sub-contractors were not ascertained and determined until the trial of the action.

For the reasons thus briefly stated the judgment is

Affirmed.

101 & 102 May 9, 1914 (Same Term), The Court made and entered the following judgment, to-wit:

Judgment.

Filed and Entered May 9, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,

vs.

UNITED STATES to Use of J. A. PEELER et al., Trading as Faith Granite Company, and Electrical Engineering and Contracting Company, Assignee of Joseph B. Cheshire, Receiver of Carolina Electrical Company, E. J. Erbelding, and Holley & Dyches, Defendants in Error and Cross-plaintiffs in Error.

Cross-writs of Error to the District Court of the United States for the Eastern District of South Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

C. A. WOODS,
Circuit Judge.

May 9, 1914.

103 & 104 *Petition for Writ of Error.*

Filed May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,

vs.

UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

Now comes the Illinois Surety Company, the plaintiff in error and cross defendant in error in the above entitled cause, and says that on or about the 6th day of May, 1914, this Court entered an order affirming the judgment of the District Court of the United States for the District of South Carolina against this plaintiff in error, the Illinois Surety Company, in which order and the proceedings

had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff in error, and the jurisdiction of the District Court was founded on a Federal Statute, and therefore, the decision of the Circuit Court of Appeals is not final; the matter in controversy exceeds $1,000 besides costs, all of which will fully and more in detail appear from the record and assignment of errors.

Wherefore the plaintiff in error, the Illinois Surety Company, prays that a writ of error with supersedeas may be allowed in its behalf from the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record and proceedings and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States and that the judgment herein complained of may be reversed.

ILLINOIS SURETY COMPANY,
By W. H. TOWNSEND,
B. E. HINTON,
Attorneys.

105 & 106 *Assignment of Errors.*

Filed May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,
vs.
THE UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

And now comes the Illinois Surety Company, plaintiff in error and complains that the judgment entered in the above entitled cause on the 6th day of May, 1914 is erroneous and unjust to plaintiff in error.

1st. Because the Court erred in finding and concluding that "final settlement", within the meaning of the Act of Congress of February 24, 1905, 33 Stat. L. 811, amending act of August 13, 1894, 28 Stat. L. 278, was effected on or before August 26, 1912, the date of the voucher prepared by the Government and certified by the contractor as correctly stating the balance due him under the contract, and in therefore finding and concluding that this action commenced March 6, 1913 was not brought prematurely or before the expiration of six months from the date of final settlement.

2nd. Because the said Court erred in holding and concluding, in effect, as matter of law that the term "final settlement" in the statute in question means a final adjustment and determination of the balance due under the contract and not the final payment by the Government in discharge of its liabilities under the contract.

3rd. Because said Court erred in matter of law in not finding as matter of fact and concluding from the documentary and undisputed evidence in the case that the final settlement of the contract within

the meaning of the statute was had either on September 9, 1912 when the voucher was approved for payment as per endorsement stamped thereon or on September 11, 1912 when the check was issued and accepted by the contractor in payment and discharge of the liability of the United States under said contract.

107 & 108 4th. Because said Court erred in holding that a complete cause of action under the act existed in favor of the plaintiffs on March 6, 1913, when the original bill of complaint was filed.

5th. Because said Court erred in not holding and concluding that the bringing of this action was unauthorized under the statute on March 6, 1913, when the original complaint was filed and that it should therefore be dismissed.

6th. Because said Court erred in not holding that the trial Court was without power to allow, after the expiration of the statutory period of one year prescribed for filing suit, amendments to the original complaint and intervening petitions, which bill of complaint had not only been filed before the expiration of six months after the final settlement of the contract, but neither it nor the intervening petitions stated a cause of action in that they did not allege that there had been a completion of the contract and final settlement thereof between the Government and the contractor, nor that such completion and final settlement occurred more than six months and within a year before the date of the commencement of the suit.

7th. Because said Court further erred in not holding and concluding as a matter of law that the original complaint did not state a cause of action under the statute and that there was therefore no action under the statute pending in the Court upon the filing of said complaint, and that the petitions of intervention thereafter filed could not cure the vice in the original suit, and that the bill of complaint and petitions of intervention should have been dismissed.

8th. Because the said Court erred in holding and concluding that judgment could be awarded in this action to or for the benefit of the Carolina Electrical Company although that Company was neither a party to nor had intervened in the action.

9th. Because said Court erred in not holding and concluding that the rights of plaintiffs and the intervenors if any, upon the bond in question were barred under the statute inasmuch as no cause of action under the statute was stated to the court until

109 & 110 the service of the amended complaint which was served more than one year after the date of the final settlement of the contract between Stannard and the United States.

10th. The said Court erred in not holding and concluding that the right of action given by the statute to subcontractors, laborers and material men was in equity and not at law and that the trial Court was without jurisdiction to proceed in or try the action at law.

Wherefore the said plaintiff in error, the Illinois Surety Company, prays that the said judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

H. W. TOWNSEND,
B. E. HINTON,
Att'ys for Illinois Surety Co., Plaintiff in Error.

Order Allowing Writ of Error.

Filed and Entered May 20, 1914.

United States Circuit Court of Appeals, 4th Circuit.

No. 1242.

ILLINOIS SURETY COMPANY, Plaintiff in Error and Cross-defendant in Error,
vs.
UNITED STATES to the Use of J. A. PEELER et al., Defendants in Error and Cross-plaintiffs in Error.

On this 20th day of May, 1914, comes the Illinois Surety Company, plaintiff in error and cross defendant in error, and presents to the Court its petition, praying for the allowance of a writ of error and also presents an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment and order herein was rendered, duly authenticated may be sent to the Supreme Court of the United States and that such order, and further proceedings may be had as are proper in the premises, and that the judgment of this Court be reversed. And the said defendant also presents to the
111 & 112 Court bond in the sum of Nine Thousand Dollars ($9,000) conditioned according to law, with sufficient security, which bond is hereby accepted and approved by this Court.

And upon consideration thereof the Court doth allow the writ of error to the said plaintiff in error, the Illinois Surety Company, which shall appear as a supersedeas and it is ordered that a transcript of the record and the proceedings in the case aforesaid be transmitted to the Supreme Court of the United States and the same is transmitted accordingly.

J. C. PRITCHARD,
U. S. Circuit Judge.

Writ of Error Bond.

Filed May 20, 1914.

Know all men by these presents, That we, Illinois Surety Company, a corporation, of Illinois, as principal, and Equitable Surety Company, a corporation, as surety, are held and firmly bound unto J. A. Peeler, L. M. Peeler and P. A. Peeler, partners trading as Faith Granite Company; Electrical Engineering and Contracting Company assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company; E. J. Erbelding; B. F. Holley and H. P. Dyches copartners trading as Holley & Dyches, defendants in error in the full and just sum of Nine thousand ($9,000.00) dollars, to be paid to the said defendants in error, their certain attorneys, executors, ad-

ministrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of United States Circuit Court of Appeals for the Fourth Circuit in a suit depending in said Court, between the United States to the use of said defendants in error, J. A. Peeler, et al., and the said Illinois Surety Company a judgment was rendered against the said Illinois Surety Company and the said Illinois Surety Company having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the
113 & 114 said defendants in error citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Illinois Surety Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ILLINOIS SURETY COMPANY, [SEAL.]
B. E. GEAMANN, *Att'y in Fact.* [SEAL.]
EQUITABLE SURETY COMPANY, [SEAL.]
By ALBERT W. WILLETT,
Attorney in Fact.

Sealed and delivered in presence of—
BYNUM E. HINTON.

Approved by—
J. C. PRITCHARD,
U. S. Circuit Judge.

115 *Writ of Error.*

Issued May 20, 1914.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals of the 4th Circuit, at Richmond, Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Illinois Surety Company, Plaintiff in error and Cross-Defendant in Error, versus United States, to the use of J. A. Peeler, et al. trading as Faith Granite Company, and Electrical Engineering and Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, E. J.

Erbelding, and Holley & Dyches, Defendants in Error and Cross-Plaintiffs in Error, a manifest error hath happened, to the great damage of the said Illinois Surety Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals, Fourth Circuit.

Allowed by
J. C. PRITCHARD,
U. S. Circuit Judge.

116 [Endorsed:] Service of Writ of Error. Certified copy of this writ of error is lodged in the Clerk's office for adverse parties this 20th day of May, 1914. Henry T. Meloney, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

117 & 118 *Citation.*

Issued May 20, 1914.

UNITED STATES OF AMERICA, *ss:*

To J. A. Peeler, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company; Electrical Engineering and Contracting Company, E. J. Erbelding, and B. F. Holley and H. P. Dyches, Copartners, Trading under the Name of Holley & Dyches, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Appeals of the 4th Circuit wherein the Illinois Surety Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment ren-

dered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 20th day of May, in the year of our Lord one thousand nine hundred and fourteen.

J. C. PRITCHARD,
U. S. Circuit Judge.

Service of the above writ is hereby acknowledged to have been made upon me at Columbia, S. C., this 22nd day of May, A. D. 1914.

D. W. ROBINSON,
Att'y for J. A. Peeler et al., Def'ts in Error.

119 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 27" day of May, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Endorsed on cover: File No. 24,268. U. S. Circuit Court Appeals, 4th Circuit. Term No. 176. Illinois Surety Company, plaintiff in error, vs. The United States to the use of J. A. Peeler, L. M. Peeler, and P. A. Peeler, partners, trading under the firm-name of Faith Granite Company, et al. Filed June 11th, 1914. File No. 24,268.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

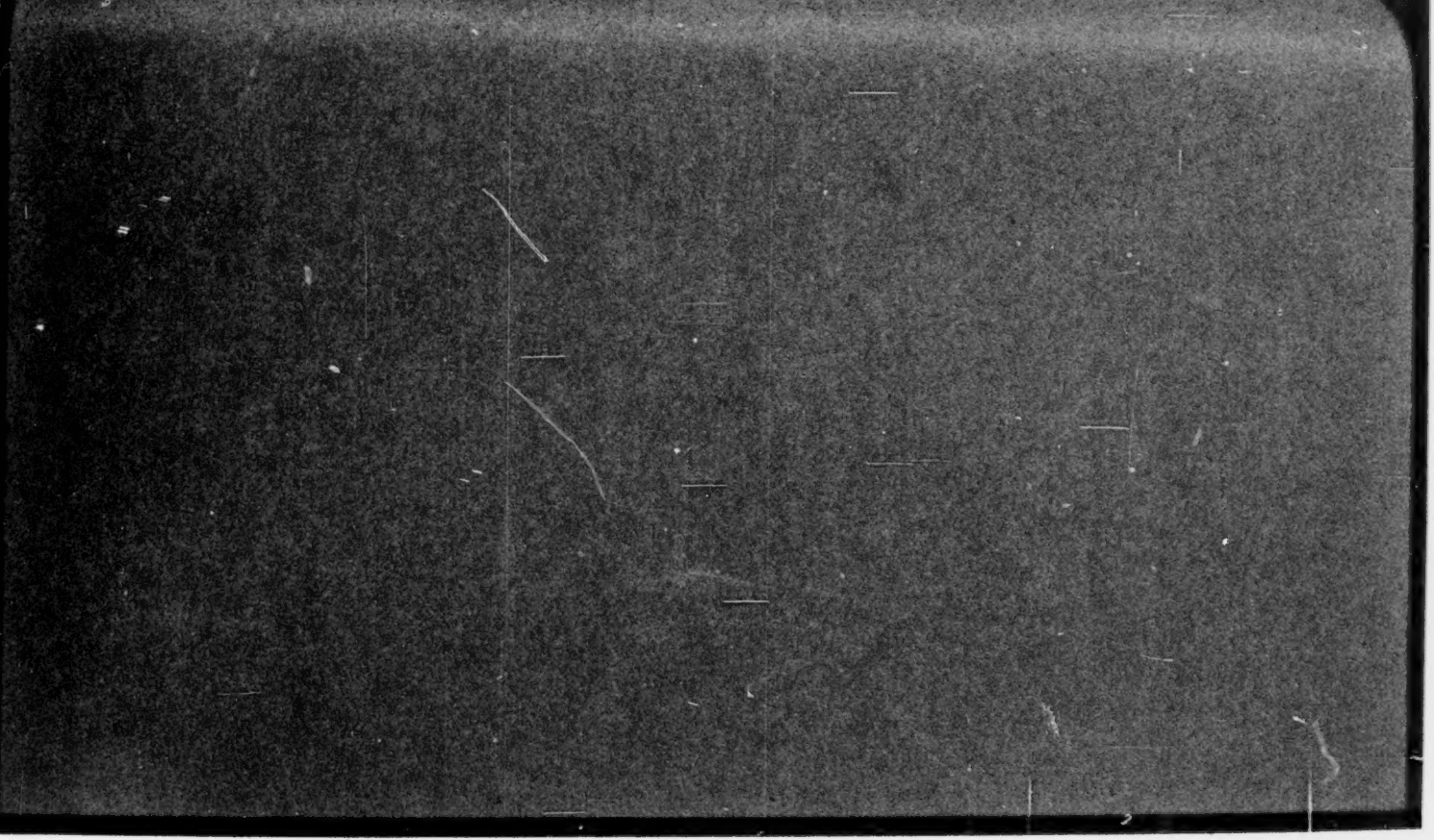
THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY AND SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

BENJ. E. PIERCE,
JOHN L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Defendants in Error.

JANUARY 18, 1916.



IN THE

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY AND SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

I.

Final Settlement.

U. S. *vs.* Ill. Surety Co., 195 Fed., 307, arose under a contract in the Navy Department. The work had been completed and a settlement and adjustment had been reached, but there was a provision in the contract by which the Government retained five per cent for one year to require the

contractor to keep the work in repair, and the district judge held that the fact that this amount was retained by the Government did not prevent a subcontractor or materialman from bringing suit under this statute before the one year of retention had expired, provided such suit was brought six months after the complete performance and the adjustment and settlement of the balance of the contract.

This case was subsequently carried to the Circuit Court of Appeals, and this position of the district judge was fully approved and affirmed, both on the original hearing and on the rehearing (226 Fed., 661-2), the court using this language:

> "We agree with the views expressed by the trial judge on both points, 195 Fed., 306. The statutory phrase 'settlement thereof' does not mean 'payment therefor.' When a final accounting was had between Schott and the Government, the contract was finally settled, even though payment of part of the balance found due on the accounting was to be withheld for a year as security for a guaranty of the work and the covenant to keep it in repair during that period."

In U. S. *vs.* Mass. Bonding Co., 215 Fed., 244, cited by counsel for plaintiff in error at page 14 of his argument, Circuit Judge Dodge, in discussing the meaning of final settlement in connection with the case of U. S. *vs.* Ill. Surety Co., 195 Fed., 306, says:

> "There are no such stipulations in the contract here under consideration, and unless 'final settlement' can be taken in the sense for which this subcontractor contends, it is not shown that the statutory condition precedent was satisfied when the suit was brought. There is difficulty in holding that there can be no 'final settlement' of such a contract as this before full payment of everything due under it has been made. If such full payment was intended to be the beginning of the six-month period, it is difficult to see why a term whose meaning is open to so much question as the term 'final settlement,' should have been used to express it. But even if it be conceded that final de-

termination of what was due for the completed work would be 'final settlement' intended by the statute, I am unable to regard the agreed facts as sufficient to show that the quartermaster's report in March was 'final settlement' in that sense. The Treasury Department, it would seem, had still to pass upon that report, and its decision was not made until January, 1913, and a suit brought before it was made would still be premature.

"It is true that either 'final settlement,' in the above sense, or final payment, might be delayed for a year or more after completion of the work, and that in a suit brought six months thereafter no creditor could intervene, according to the strict language of the statute, which allows such intervention within a year from the completion of the contract work and not later. But even in view of this difficulty in ascertaining the true meaning of the statute, I am unable to hold that these agreed facts establish a 'final settlement' six months prior to November 7, 1912. I must therefore find for the defendant and dismiss the suit."

II.

Amendment.

The case of Lilly *vs.* Railroad Co., 32 S. C., 142, cited by counsel for plaintiff in error at page 28 of his brief, holds that where an action was commenced by the widow of an intestate as administratrix for the recovery of damages for the death of her husband, and alleged "that said plaintiff and —— children of tender years were solely dependant for support and subsistence upon him, and by reason of his death, *i. e.*, of the death of the said Green Lilly, is left utterly helpless and destitute, and was damaged in the sum of $10,000.00," could not be amended by adding a paragraph setting forth "That said plaintiff was the widow of said Green Lilly, deceased, and she brings this action for the benefit of herself and her several children by said Green Lilly," the court holding that the complaint did not state a cause of

action at all, and that there was nothing to amend. And as under the statute the action could only be maintained by the widow in her own right for herself and children the action was gone.

The case of Coker *vs.* Monaghan Mills, also cited at the same page, was a decision by District Judge Brawley, based upon the Lilly case. The Lilly case, while based upon a State statute which is very much more circumscribed in its provisions than section 954 of the Revised Statutes of the United States, certainly cannot have any bearing in this court on the construction of that statute. The decision is in direct conflict with the decisions on section 954, in the case of Vandoren *vs.* Ry., 93 Fed., 271; 35 C. C. A., 293, and McDonald *vs.* State of Neb., 101 Fed., 171; 41 C. C. A., 287-8, and with the decision of this court in M., K. & T. R. Co. *vs.* Wulf, 226 U. S., 576; 57 L. Ed., 363, and the authorities cited above from this court and the Circuit Court of Appeals, at pages 14-18 of our brief.

IV.

Action at Law or in Equity.

The stipulation or letter of request made by the attorneys for all parties in this action, at pages 7-8 of the record, had more especial reference to the practice in the State court, under which three court calendars are provided and kept, No. 1 being ordinarily for the trial of issues of fact before a jury in law cases. The statutory provisions of the State of South Carolina are contained in sections 310, 312, and 314 of the Code of Civil Procedure of 1912, being volume 2, part 1. The portion of section 314 material to this point is:

> "There shall be three calendars for the court of common pleas, and the clerk shall arrange the causes thereon as follows: Upon calendar 1 shall be placed all cases and issues to be passed upon by a jury. Upon

calendar 2 shall be placed all cases to be passed upon by the court, including all motions and rules to show cause."

Section 312 is:

"*Issues—How Tried.*—An issue of law must be tried by the court, as also cases in chancery, unless they be referred as provided in chapter V of this title. An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived, as provided in section 326, or a reference be ordered."

The rules of the circuit and district court which were adopted and promulgated by Circuit Judge Simonton and District Judge Brawley, dated April 10, 1896, and taking effect July 6, 1896, and in force at the time of this hearing, applicable to this question, are:

"*Rule XX.*

"The clerk shall make three dockets. One docket shall contain all cases at issue. The other docket shall contain all motions to be tried by the court. Docket number three shall contain all cases wherein orders for judgment by default have been entered at the Rule Day, but final judgment cannot be had except by an application to the court in term."

Under rule 27 of the rules adopted by District Judge Smith, in force on and after January 1, 1914, he has slightly changed the names of the calendars or dockets, and speaks of the default docket as the first one, and jury issue docket as the second one. But this rule was not promulgated at the time (April 5, 1913) this letter of request was written, and the attorneys for all parties had in mind the old rule and State practice.

Question Raised Too Late.—In addition to the authorities which we have cited already (page 23 of our brief), we call

the court's attention to the decision of the Circuit Court of Appeals in U. S. *vs.* Ill. Surety Company, 226 Fed., 663-4, where the same question was raised by the same party who now raises it. After the argument had been filed in the Circuit Court of Appeals, but before the case was decided, the Judicial Code was amended by the act of March 3, 1915, adding section 274*a*, which provides:

> "SEC. 274*a*. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

While the court calls attention to this provision of the Code in declining to listen to this technical objection, it adds:

> "But even without the new statute the objection could not prevail for inasmuch as the court of law clearly was not without jurisdiction of the subject-matter, it comes too late. U. P. R. R. Co. *vs.* Whitney, 198 Fed., 784, 787; 177 C. C. A., 392; Reynes *vs.* Dumont, 130 U. S., 354; 9 Sup. Ct., 486; 32 L. Ed., 934. Again, as the case was, in effect, tried by the court without a jury, and its findings of fact are not attacked, it is of no practical importance whether a court of law or of equity was the proper forum."

In the case of Union Pac. Ry. Co. *vs.* Harris, 63 Fed., 800; 12 C. C. A., 598, the court said:

> "The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time

> in the court of original jurisdiction. * * * If a party, when sued at law, conceives that the action or any material issue in it, is of equitable cognizance *he must interpose the objection at the threshold of the case.*"

This case was afterwards affirmed by this court in 158 U. S., 326; 39 L. Ed., 1003, without noticing the question as to the mode of trial, though it appeared on the face of the record.

The case of U. S. *vs.* Mass. Bonding Co., 215 Fed., 243-4, cited by counsel for plaintiff in error, was an action at law. U. S. *vs.* Emery, 225 Fed., 291-2, was an action at law.

Respectfully submitted.

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JANUARY 13, 1916.

Service of foregoing brief acknowledged.

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JANUARY 13, 1916.

[Endorsed:] Supreme Court of United States. October term, 1915. No. 176. Ill. Surety Co., plaintiff in error, *vs.* The United States to the Use of J. A. Peeler, etc., *et al.*, defendants in error. Brief of counsel for defendants in error in reply. (24,268.) D. W. Robinson, Att'y.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY, *et al.*, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

BYNUM E. HINTON,
Attorney for Illinois Surety Co.,
Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case is here upon writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, to review a judgment which affirmed a judgment of the District Court for the Eastern District of South Carolina against the plaintiff in error, the Illinois Surety Company, and in favor of the defendants in error, in an action founded on the act of Congress of August 13, 1894 (28 Stat. L., 278, ch. 280), as amended February 24, 1905 (33 Stat. L., 811, ch. 778).

This statute reads as follows:

> "*Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials; remedies on bonds, and proceedings in actions thereon.*
>
> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata*, among said interveners. If no suit should be brought by the United States *within six months from the completion and final settlement of said contract*, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be,

and are, hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, that where *suit* is instituted by any of such creditors on the bond of the contractor, *it shall not be commenced until after the complete performance of said contract and final settlement thereof*, and shall be commenced within one year after *the performance and final settlement of said contract*, and not later; *and provided further*, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability: *Provided further*, that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper of general circulation published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." (Italics ours.)

The action was at law, and was commenced March 6, 1913 (Record, p. 48), when a complaint was filed by the

use plaintiffs, J. A. Peeler, and others, trading as Faith Granite Company, and Electrical Engineering and Contracting Company, assignee of Joseph B. Cheshire, receiver of Carolina Electrical Company, against Ambrose B. Stannard and the Illinois Surety Company, plaintiff in error herein. Notice to other creditors was published, as provided in the act, and thereafter E. J. Erbelding and Holley & Dyches intervened in the action.

The use plaintiffs and interveners alleged that defendant Stannard had on the 5th day of July, 1910, entered into a contract with the United States for the construction of a post-office building at Aiken, South Carolina, for the agreed compensation of $45,618, and had given to the United States the usual penal bond, with the Illinois Surety Company as surety, in the penal sum of $23,000, conditioned, among other things, "that said Stannard shall promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract;" that said use plaintiffs and interveners had furnished labor and materials to Stannard for use in the prosecution of the work, for which they had not been fully paid, and demanded judgment for this balance to recover the same from said Stannard and the Illinois Surety Company. The original complaint alleged that the affidavit required by the statute had been made and that certified copies of the original contract and bond had been procured from the Secretary of the Treasury, but contained no allegation as to when, however, said work had been completed or final settlement therefor made.

Each of the defendants appeared on the 4th day of April, 1913, and filed separate answers to the original complaint and petitions of intervention, containing general denial of the facts alleged in said complaint and petitions of intervention; and thereafter served and filed notices of motion, in the nature of a demurrer, to dismiss the original complaint with petitions of intervention, on the ground that they do

not exhibit to the court a then existing cause of action, in that they did not show that the work had been completed and final settlement made more than six months and within one year prior to the time of the commencement of the suit; and upon the further ground that the right of action given by the act of Congress is equitable in its nature and cannot be inquired into or determined at law (Record, p. 12).

The motion to dismiss was heard on October 3, 1913 (more than one year after the completion and final settlement of the contract), and the court held in effect that the complaint and petitions of intervention did not show an existing cause of action, but allowed the same to be amended so as to include these necessary allegations. The court also held that the action was properly brought as an action at law. The motion was accordingly overruled. The opinion of the court is found on pages 13 to 16 of the record. The defendants duly noted an exception to the court's ruling and stated fully the grounds of their exception (Record, pages 16 and 17).

Amended complaints and petitions of intervention were thereupon filed and separate answers were made thereto by the defendants, upon which issue was joined, and the case was tried by the court without a jury, trial by jury being waived by consent of the parties (Record, p. 30).

The defendant Stannard pleaded discharge in bankruptcy, which plea was allowed (Record, p. 30).

The Facts as Shown at the Trial and as Found by the Court.

The record shows (Record, pp. 38-39) that the Supervising Architect on August 21, 1912, reported to the Secretary of the Treasury that the building had been practically completed June 3, 1912; that the chief of the technical division of his office had on August 15 certified that all work embraced by the contract had been satisfactorily completed and that all necessary proposals for additions, deductions, etc., had been received and had appropriate action, and recom-

mended certain deductions for damages for delay and requested authority to issue and pay a voucher in favor of the contractor for the outstanding balance under the contract of $3,999.01. On August 23, 1912 (Record, pp. 39-40), a letter was addressed to the custodian of the post-office at Aiken, South Carolina, furnishing him a statement of the account and directing him to prepare a voucher and forward it to the contractor for signature and reference to the Department for payment. On the same day a letter was addressed to the contractor informing him of the action taken, showing the deductions made and the balance found due. Voucher was prepared by the custodian bearing date August 26, 1912, and presumably forwarded to Mr. Stannard for signature and reference to the Department. He certified that the bill was correct and just. It appears on the face of the voucher (Record, p. 42) that it was received back in the office of the Supervising Architect August 29, 1912. The voucher was then approved, "By order of the Secretary: J. W. Parsons, Chief, Division of Accounts" (Record, p. 43). The date of this approval does not appear. It appears, however (Record, p. 43), that the voucher was then forwarded to the disbursing clerk, where it was received September 10, 1912, and was paid by check No. 10,878, dated September 11, 1912, and cashed by Stannard, September 12, 1912 (Record, pp. 41-43).

The court made the following finding on these facts:

> "The building was constructed and completed, and on the 21st day of August, 1912, the Treasury Department on behalf of the United States stated and determined the final balance to be paid A. B. Stannard in full settlement of the amount to be paid him under the contract at the sum of $3,999.01. The adjustment and determination of the Department to this effect was communicated to Stannard, who, on August 24th acknowledged receipt of the notification, and that a voucher would be issued to him in the amount of $3,999.01 in full settlement. On August 26th a voucher of that date was prepared by the Depart

ment showing the balance due Stannard to be $3,999.01, to which voucher Stannard appended his signature certifying that the bill for that amount was correct. There is no separate date placed to his signature, but the date of the voucher is August 26, 1912. The signature is presumably at the same date, and I find as a conclusion of fact that on August 26, 1912, Ambrose B. Stannard accepted the adjustment made and proposed by the Government for a final payment to him of $3,999.01 as in complete settlement of all his claims against the Government for his work under the contract before mentioned. On the 11th of September thereafter a cheque for the sum of $3,999.01 was made out by the disbursing clerk of the Treasury Department payable to the order of Ambrose B. Stannard, who thereafter collected it."

The court thereupon found that there was $3,046.29 due the Faith Granite Company, $2,352.60 due E. J. Erbelding, and $500.71 due Holley & Dyches; and then as to the claim of $498.69, asserted by the Electrical Engineering and Contracting Company, assignee of the Carolina Electrical Company, found as follows:

"I find that the order proven in the cause as the authority for the receiver of the Carolina Electric Company to assign their claim to the Electric Engineering and Contracting Company is not sufficient authority for it. As, however, the statute permits any intervener to come in without any precise regulation of form other than a creditor may file his claim and be made a party hereto, I hold that the proceeding in this case is a sufficient filing of the claim on behalf of the Carolina Electric Company, and that such company is entitled to recover the amount above stated, judgment when awarded to be in the name or for the benefit of the Carolina Electric Company, and to be paid only to such person as may be authorized by law to receive it for them."

Judgment was accordingly entered for the benefit of the Carolina Electric Co. and the other three claimants in the respective amounts so found due.

Writ of error was thereupon sued out to the Circu
of Appeals and the judgment of the lower court was
in its entirety. The Court of Appeals, however, did
cide the question of whether the action authorized
statute is one at law or in equity, holding that this
no practical importance, as both parties had waiv
by jury and requested the court itself to try the case (
p. 70).

The opinion of the Court of Appeals is found o
65 to 70, inclusive, of the record.

Writ of error was thereupon issued out, bringing
to this court.

Points and Authorities.

The assignment of errors (Record, p. 72-3), pres
following questions for this court's decision:

I. Is the action given by the statute an action a
in equity, and if in equity, was it reversible error
trial court to proceed in and try it as an action
(Assignment 10.)

II. Was the action brought before the expiratio
months from "complete performance of the cont
final settlement thereof" within the meaning of the
(Assignments 1, 2, 3, 4, and 5.)

III. Was the court authorized to render judgm
the benefit of the Carolina Electrical Company, altho
company was neither a party to nor had intervene
action? (Assignment 8.)

IV. Did the amendment of the pleadings after
piration of one year from completion and final s
of the contract relate back to the commencemen
action? (Assignments 6, 7, and 9.)

These points will be taken up in the order named,

I.

Right of Action in Equity and Not at Law.

(Assignment 10, Record, Page 73.)

In United States *vs.* Wells, 203 Federal, 146, District Judge Sanford, Eastern District of Tennessee, had the following to say on this question (p. 147-8):

> "There is, in my opinion, strong ground for holding that the provisions of this act that *only one suit shall be instituted by a creditor or creditors, and for notice to other creditors of their right to intervene*, and the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors, *judgment shall be given to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity* and distributed among creditors in equitable proceedings; and that, in the language of Chief Justice Waite, in Pollard *vs.* Bailey, 20 Wall., 520, 525 (22 L. Ed., 376), the provision 'for proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.' see also, Terry *vs.* Tubman, 92 U. S., 156, 161 (23 L. Ed., 537); Horner *vs.* Henning, 93 U. S., 228 (23 L. Ed., 879); Handley *vs.* Stutz, 137 U. S., 366 (34 L. Ed., 706); Bailey *vs.* Tillinghast (C. C. A., 6), 99 Fed., 801, 805; 40 C. C. A., 93; Alsop *vs.* Conway (C. C. A., 6), 188 Fed., 568; 110 C. C. A., 366; Merchants' Bank *vs.* Stevenson, 10 Gray (Mass.), 232. This view is emphasized by the fact that there is *no right of intervention in a case at common law*, and that a *court of law has no adequate machinery for the entertainment and distribution of funds among the various beneficiaries thereto.*" (Italics ours.)

In United States to the use of Miller *vs.* Mitchell, 212 Fed., 136 (C. C. A., 2d Cir.), Judges Lacombe, Coxe, and Ward,

speaking through Judge Ward, held, after quoting th
amendment of February 24, 1905 (p. 139):

> "*We see in this amendment an intent on the pa*
> *of Congress to substitute for a number of indepen*
> *ent actions at law*, in which vigilant had a priori
> over non-vigilant creditors, *a suit in which*
> creditors shall be given notice and an opportunity
> intervene and share ratably in a fund intended f
> the equal protection of all. *This provision whi*
> *is not adapted to nor indeed available in actions*
> *law, distinctly marks the proceeding as equitab*
> We are not convinced by the able presentation of t
> contrary view in U. S. *vs.* Stannard (D. C.) 2
> Fed. 198, which is the only case in which the questi
> has been raised down to the present time." (Ital
> ours.)

In United States *vs.* Scheurman, 218 Fed., 915, Distr
Judge Dietrich, District of Idaho, said (p. 919-20):

> While the question is not free from uncertain
> *I am inclined to the view that the action is upon*
> *equity side of the court. In some contingencies*
> *least there are adjustments to be made which*
> *difficult to accomplish by the verdict of a jury.*
> was doubtless the purpose of Congress to substit
> the undertaking for the right of lien which in n
> jurisdictions is conferred upon laborers and mate
> men, in the case of private structures, and the
> forcement of claimants' rights in the undertaking
> a case like this is not without analogy to the enfo
> ment and marshalling of mechanics' liens, and
> distribution of the proceeds in case a sale of the pr
> erty to which the liens attach is necessary. Under
> statute the surety may pay into court the full amo
> of the penalty of the bond and thereupon be relie
> from further liability, and *in such case the proc*
> *ing very clearly takes on an equitable aspect;*
> *only function being to equitably distribute a gi*
> *fund to numerous claimants in proportion to t*
> *several rights.*" (Italics ours.)

In U. S. *ex rel.* Hill *vs.* American Surety Company, 200 U. S., 197, construing the present act, this court said:

> *"A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter."* (Italics ours.)

It thus appears that, in the opinion of the eminent Federal judges above quoted, the action of Congress as amended February 24, 1905, created a right of action in equity and not at law. The only decision to the contrary is District Court decision in U. S. *vs.* Stannard, 207 Fed., 202-3. When the abundant and convincing reasons in favor of construing the statute as creating an action in equity are compared with the meagre reasons given in the Stannard case to the contrary, the argument, we submit, is all one way and in favor of equity.

In fact the Circuit Court of Appeals in the instant case did not question the contention of the plaintiff in error that the statute contemplated an equity action, but dismissed the proposition on the ground that it was of no practical importance, as trial by jury was waived. This is tantamount to holding that it is of no practical importance whether or not the provisions of the statute as to procedure are followed; that it is entirely a matter of expediency; that, although the statute which created the right of action provided that it must be in equity, the court may proceed to try it at law, if in the court's opinion the matter may be disposed of equally as well in that court. We do not believe such a doctrine will be approved by this court. It is not a question of whether or not a particular case under the act may possibly be completed without encountering equitable defenses. In other words, it is not a question of a particular case, but whether or not the right of action given by the statute is in equity; whether Congress has in the act itself restricted the right to equity. If so, the provisions of the act must be complied with, in this respect as well as others.

Whether or not questions in a particular case may arise cognizable only in equity cannot be always known when the action is instituted. Obviously, suits cannot be prosecuted under this act promiscuously, in law or in equity, and be transferred from law to equity or *vice versa*, as developments may require. Nothing could more tend to confuse and obliterate the distinction between law and equity which has been so carefully preserved in the Federal courts.

It is the settled law of the Federal courts that an action which is inherently equitable in its character cannot be adjudicated in a court of law, even by consent of the parties.

> Thompson *vs.* R. R. Companies, 6 Wall., 134.
> Lindsay *vs.* First National Bank, 156 U. S., 485.
> Levi *vs.* Mathews, 145 Fed., 152.

Lindsay *vs.* First National Bank, *supra* (p. 489), was an action at law, and an "exception," equivalent to a demurrer, raised the objection in the lower court that the action was equitable. The exception was overruled and the case proceeded to trial and judgment. When the case reached this court, this court held:

> "The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles, and that although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. Cases cited.
>
> "It is true that the cases in which such strictures have been expressed have been usually those in which

> resort has been had to equitable forms of relief, instead of legal remedies, and when defendants have thus been deprived of the constitutional right of trial by jury; but, so long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law prescribed by the judge for the usual and legitimate practice of a court of chancery."

This decision is still the law of the land and has been cited with approval in innumerable Federal decisions.

In Levi *vs.* Mathews, *supra* (C. C. A.), before Goff and Pritchard, circuit judges, and Purnell, district judge, Judge Purnell, speaking for the court, said (145 Fed., 154):

> "The distinction between legal and equitable defences, whatever may be the rule in other jurisdictions, in the courts of the United States, are always recognized and jealously guarded. They cannot be mixed. *Equitable suits must be on the equity side of the docket, and actions at law on the law side. No principle is better settled in these courts.* Burnes *vs.* Scott, 117 U. S., 582; 6 Sup. Ct. 865; 29 L. Ed., 991. ***Nor can this distinction or jurisdiction be waived by consent of parties, but can and should be enforced by the court of its own motion. It is statutory.*** Thompson *vs.* R. R., 73 U. S., 134; 18 L. Ed., 765; Lewis *vs.* Cocks, 90 U. S., 466; 23 L. Ed., 70; Oelrichs *vs.* Spain, 82 U. S., 211; 21 L. Ed., 43; Lindsay *vs.* Bank, 156 U. S., 485; 15 Sup. Ct., 472; 39 L. Ed., 505. The claim of defendant below, plaintiff in error here, therefore, that the filing of the replication traversing the allegations of the complaint gave the court jurisdiction and made it the duty of the trial judge to submit the issues thus raised and tendered is without force. *Consent cannot confer jurisdiction.* The court of law was without jurisdiction of an equitable defense, and nothing the parties could do could endow it with jurisdiction. This is fundamental as to the United States courts." (Italics ours.)

II.

This Action was Prematurely Brought.

(Assignments 1, 2, 3, 4, and 5, Record, p. 72-3.)

The action was commenced on *March 6, 1913*. Whether or not this was premature depends upon whether "complete performance of said contract and final settlement thereof," within the meaning of the act, had taken place before SEPTEMBER 6, 1912. The issue depends upon the meaning of the words "complete performance" and "final settlement," as used in the act. There was no question about the facts. The material facts, as shown by the record (pages 38 to 43, inclusive), and found by the court (Record, p. 47), are:

> "August 21, 1912, Supervising Architect reported to Secretary that the building was completed, and asked for authority for the issue and payment of voucher of balance due the contractor, which report was approved and authority given that same day.
>
> "August 26, contractor agreed that amount shown on voucher was correct and just.
>
> "September 10, voucher received by disbursing clerk.
>
> "September 11, check issued in payment.
>
> "September 12, check cashed by contractor."

The question thus presented is whether or not there was complete performance and final settlement of this contract within the meaning of the law, before September 11, when check was issued by the disbursing clerk making final payment.

There have been a number of decisions by the Federal courts dealing with this question, on contracts arising under the different Executive Departments.

U. S. *vs.* Stitzer, 182 Fed., 513 (Navy Department Contract).

U. S. *vs.* Mass. Bonding Co., 215 Fed., 241 (War Department Contract).

U. S. *vs.* Robinson, 214 Fed., 38 (Treasury Department Contract).

U. S. *vs.* Winkler, 162 Fed., 397 (War Department Contract).

U. S. *vs.* Bailey, 207 Fed., 783 (Interior Department Contract).

The act of February 24, 1905, *was passed, not for the benefit of subcontractors,* but *for the benefit of the Government.* This is pointed out, apparently for the first time, in the Robinson case, *supra.* Circuit Judge Lacombe there said:

> "The statute is awkwardly and inartificially expressed, but it seems to us it may be easily construed by applying the well recognized rule of ascertaining first what was the difficulty to remedy for which the statute was passed, and second, what was the method adopted to remedy such difficulty."

Then, after pointing out that the act was passed to prevent subcontractors and material men from depleting the security which the Government had provided to secure a proper execution of the contract, further said:

> "The more important part of the new act is found in the clauses which provide in substance that no material man shall take one dollar of the fund which the bond produces until every dollar due the United States under the contract shall be fully paid. Keeping these clauses in mind, it seems to us that a reasonable interpretation of the disputed phrase is to be readily found. In determining the time when material men may begin suit, it would not do to fix it at some day 'after complete performance' merely. Defective work and damages for delay and other matters give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to 'complete performance of the contract *and final settlement thereof.*'

> We take it that these italicized words refer to the time when the proper Government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the Government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way. Six months after that date, material men may begin suit. This construction protects the Government against the defect of the old act, viz: that its suit to recover might prove defective because the money is gone. We can see no reason why Congress should have provided that when the Government claim nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the Government for having underpaid him reaches a conclusion. Such suit can in no way affect the funds provided by the bond, out of which the Government might have satisfied its claim, if it had any. In other words, we see no reason for holding that the final settlement must be mutual, in cases where the Government makes no claim against the contractor."

That the purpose of the act was as stated by Circuit Judge Lacombe, is shown by the following from the report (No. 2360, 58th Cong., 2d Sess.) of the Judiciary Committee of the House of Representatives on the bill, which was passed and became the act of February 24, 1905:

> "The bill proposes to amend the act of August 13, 1894, for the protection of persons furnishing materials and labor for the construction of public works in such manner as to secure to the United States priority in the satisfaction of its claim against the contractor for such works out of the penalty of the bond given by him, in case he should fail in the performance of his contract, and to provide for a distribution of the remainder of such penalty among the persons furnishing labor and materials to the contractor, ratably in proportion to the amount of their respective claims, in case such remainder is insufficient to satisfy the claim of all.

"The necessity for this amendment has been brought about by the decisions of the Federal courts that the law which gives the United States priority in the satisfaction of its claim against an insolvent (Rev. Stat., sec. 3466), has no application to the case of an insufficiency of the penalty of the contractor's bond to satisfy both the claim of the United States and the claims of subcontractors in the event of a default by the contractors. (United States *vs.* Heaton, 124 Fed. Rep., 699, since affirmed by Circuit Court of Appeals; American Surety Co. *vs.* Lawrenceville Cement Co. *et al.*, 110 Fed. Rep. (25), 913; 123 Fed. Rep., 288; 124 Fed. Rep., 699; 126 Fed. Rep., 811).

"The practical effect of these decisions will be to postpone the United States in every case till the claims of subcontractors are satisfied, or else to compel the United States to accept a ratable share in the distribution of the penalty of the bond when all the parties having claims upon the bond are convened in a court of equity at the suit of the surety. This results from the fact that the claims of subcontractors nearly always mature before that of the United States, who are not in a position to sue on the bond until the time limited for the performance of the contract has expired."

It is thus apparent that this *act was passed for the benefit of the Government* and not subcontractors. Congress was endeavoring to protect the Government against any possible depletion by subcontractors of security provided by the bond taken by the Government. The act also shows that the proviso used for this purpose was intentionally made emphatic. In the body of the act the expression "completion and final settlement" is used, but in the proviso it said "*complete* performance of the contract and final settlement thereof." It might be observed in this connection that a contract between the Government and a contractor is bilateral and cannot be completely performed until *both parties* have done each and everything required of them by the terms of the contract. In this view, could it be said that there was

complete performance of a contract when there yet remained something to be done by the Government, namely, final payment? However, it is clear that Congress intended by the further words "final settlement" to provide that the *period of limitation should not begin to run until there had been "final settlement" of the contract.*

Meaning of "Final Settlement."

Congress was here dealing with respect to final settlement of a Government contract. It must be presumed that Congress knew the methods of final settlement then prescribed by law, and legislated with respect thereto. A complete exposition of the Government's method of settling its accounts will be found in McKnight's case, 13 Court of Claims, 292. The court there said (p. 299):

> "The Revised Statutes (sec. 236) require that 'all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.'
>
> "The principal *officers to whom this great responsibility is committed by law are called 'accounting officers' consisting of six auditors* (Rev. Stat., sec. 276), each acting separately upon different classes of accounts, and * * * the two comptrollers (Rev. Stat., sec. 268), each also acting separately in like manner * * *." (Italics ours.)

The court then takes up and shows how accounts upon the respective departments are settled by these accounting officers, resulting eventually in a warrant being issued in payment by the Treasurer of the United States, and says:

> "Then and not till then is the settlement consummated and payment authorized (Rev. Stat., sec. 3593, 3644)."

The court, after stating, "The first auditor receives and examines all accounts accruing in the Treasury Department," and after describing the method of settling accounts in this Department, further says:

> "Such is the method of the final settlement of all accounts in the Treasury, omitting much detail which occurs in carrying on the general course of business.
>
> "But vast sums of money are paid to parties for salaries and on other accounts by *disbursing officers* before the claims have passed the Treasury accounting, and the number of such officers is large, their appointments being provided for by special or general provisions of statute (Rev. Stat., sec 56-58, 62, *176*, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3646, 3648, 3658, 3677, 4839, etc.). *They are all under bonds, and responsible for the legality and correctness of their payments.* Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, *and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement* (Rev. Stat., secs. 3622-3625; McKee *vs.* United States, 12 C. Cls. R., 553). (Italics ours.)
>
> "* * * These different processes in the settlement of claims and demands upon the Government from their receipt by the auditor, through the several stages of examination, certification, and drawing of warrants for payment up to the time when the Treasurer issues his drafts, are all matters of accounting, to justify the Treasurer in paying out the public money, and *are not consummated beyond recall until the claimants receive the negotiable drafts of that officer*, drawn according to the convenience of parties upon the Treasury proper in Washington, or upon one of the several assistant treasurers or designated depositaries in some other place.
>
> "*Such drafts are understood to constitute new con-*

tracts on the part of the Government, into which the previous claims upon which they issue are merged, and are valid and binding upon the United States in the hands of *bona fide* holders, by endorsement, for valuable consideration, as commercial bills of exchange and promissory notes are between individuals, whatever valid objections or defenses there may have been to the original claims and accounts upon which the settlements were made and drafts issued (Rev. Stat., sec. 308; The Floyd Acceptances, 7 Wall., 666).

"*The certificates and orders made previously to the issuing of the drafts are departmental proceedings, directions among the several public officers, none of which are delivered to the claimants,* or even allowed to be seen and examined by them, without leave from some officer having authority to grant it. Parties gain no new rights thereby, into which their former rights of action are merged, and upon which actions can and must be brought as upon an award." (Italics ours.)

R. S., sec. 191, provided that the settlement of accounts by the accounting officers "shall be conclusive upon the executive branch of the Government and be subject to revision only by Congress or the proper courts."

The McKnight case was decided in 1877. The accounting system of the Government was thereafter revised by act of Congress July 31, 1894, ch. 174; 28 Stat. L., 162; 7 Ann. Stat., 382-5. This act repealed R. S. 191, but substituted a similar provision (section 8) making the *accounting officers' certificates conclusive upon the executive branch of the Government.* The revision also substituted the office of comptroller and assistant comptroller for the offices of the two comptrollers provided for in the old law. The revision also effected certain changes in minor details of procedure in the settlement of accounts, but the general method of settling accounts remained substantially the same. The duties and responsibilities of the disbursing officers were not changed. (See R. S., 176, and section 8, above act of 1894).

The exclusive right of the accounting officers to make final settlement, and the point at which such settlement was finally consummated, was likewise not changed.

It will be observed, therefore, that at the time this act of Congress was passed February 24, 1905, the *Secretary of the Treasury had no authority whatever to make final settlement of a contract.* His action with regard to settlement had not a single element of finality.

It will be observed that vast sums of money are paid out by *disbursing officers* before the accounts have passed this Treasury accounting. It is common knowledge that the great bulk of the public money is paid out in this way. Practically all of the money paid out on Government contracts is paid out in this manner by disbursing officers, as was done in the instant case. *These disbursing officers are under bond and they and their bondsmen are personally responsible for the legality and correctness of their payments* (R. S., 176).

We respectfully submit that there was no final settlement in the case at bar prior to the issuing of check for final payment by the disbursing office on September 11. The amount found due by the Supervising Architect and approved by the Secretary and agreed to by the contractor was not final in any sense of the word. It was not binding on anybody except possibly the contractor. The Secretary of the Treasury had no authority whatever to agree upon any amount which would bind the Government. Neither would his action in the matter carry with it any financial responsibility or any security to the Government in case of error. If it should have been found in error before payment, it would have been adjusted and revised to suit the new findings. In other words, it was a tentative or proposed settlement merely.

The action by the disbursing officer, however, in issuing his check was an entirely different matter, and would seem to meet both the letter and spirit of the act. The common acceptation of the word "settle" is to pay. Also, this is the

first point in the proceedings where the act carries with it financial responsibility and security to the Government against error. He must examine the contract and the vouchers and make sure that the proposed payment is in accordance with the facts and the law of the contract. If he is not satisfied that it is, he can have it referred to the accounting officers for final settlement (R. S., 236), or to the comptroller for an advance opinion (sec. 8, act July 31, 1894-7, An. Stat., 384). If he is satisfied that the proposed payment is correct he makes payment, and the contract is for all practical purposes closed. It is a final settlement in that sense. It goes to the accounting officers thereafter for further review, but *only incidentally as a part of the disbursing officer's account.*

Furthermore, the Government holds back a reserved percentage on every contract as additional security for the completion of the work. *It is when the disbursing officer issues his final check that this reserved percentage or additional security is released.* This is another strong indication that the Government has finally concluded it will not need to go against the contractor's bond.

Also, this one act—the issuing of check by the disbursing officer—making final payment and releasing the reserved percentage—*is the one point in the proceedings that is common to all Government Departments and other branches of the Government.* Each of the Departments have more or less different methods of procedure leading up to this point. The Treasury Department has the method shown in this case. The method of the War Department is different (U. S. *vs.* Mass. Bonding Company, 215 Fed., 241). The method of the Navy Department appears to be different from either of these (Stitzer *vs.* U. S., 182 Fed., 513). The method of the Interior Department appears to be still different yet (U. S. *vs.* Bailey, 207 Fed., 783. From the latter case it appears that the administrative officer agrees with the contractor upon a proposed basis of settlement and the contractor gives

a release, whereupon the account is referred to the auditor for final settlement, *before payment*. The court in that case held that the settlement by the auditor (one of the accounting officers) was "final settlement."

It is our contention that there cannot be final settlement of a Government contract within the meaning of the act until either the issuance of a check by a disbursing officer (if payment is made before audit), or until the settlement of the account by the auditor (if the matter is referred to the accounting officers for settlement before payment). The reason for this position is that the settlement by the "accounting officers" is a final settlement in every sense of the word, because Congress has given those officers authority to make final settlement of its accounts. The issuance of a check by a disbursing officer may reasonably be construed to be final settlement within the meaning of the present act of Congress, because by that act the work is *settled for* in the ordinary acceptation of the term; and also by that act *the reserved percentage is released* and *the disbursing officer makes himself and his bondsmen responsible for the legality and correctness of the payment*, thereby substituting the security of his own bondsmen for the security provided to the Government by the bond of the contractor. This complies with the manifest purpose of the act, to have the six months' period of limitation begin to run from the time the Government has finally concluded that it will probably not have occasion to resort to the security provided in the contractor's bond.

The finding of the court in other cases and in this case that there was a final settlement when the proposed payment by the head of the Department was agreed to by the contractor entirely overlooks the fact that the head of the Department has no authority to make final settlement; that his action with respect to settlement carries with it no real responsibility; that this proposed payment still remained to be passed on by the disbursing officer, who would either accept the responsibility and make payment, or would submit it to the

comptroller for advance decision (sec. 8, act 1894, *supra*), or would have it referred to the accounting officers for final settlement and payment (R. S., 236). It is obvious that after the head of the Department and the contractor had agreed on the amount, final settlement might have been made promptly thereafter and yet might not have been made for six months or more, as shown in the case of United States *vs.* Mass. Bonding Company, *supra*, and might then have been made on an entirely different basis.

The contention made by the defendants in error that the finding of the trial court, as a conclusion of fact, that there was final settlement in this case more than six months before institution of suit is conclusive on this court, is without force. There was no question about the facts. The error was an error of law, in holding in effect that the Secretary of the Treasury had the authority to make a final settlement with the contractor. Furthermore, if our contention is right as to the meaning of final settlement as used in the act, there is no evidence to support the trial court's conclusion that there was such a settlement prior to September 11, 1912.

The defendants in error and the lower court cited the construction placed on the words "final settlement" by the Treasury Department, and contend that it is entitled to great weight, as the construction placed on a statute by a department charged with its execution. In the first place, neither the Treasury Department nor any other executive department is charged with the execution of this statute. The departments have nothing whatever to do with its execution. Its execution is entirely for the courts. In the second place the Treasury is only one of nine executive departments, all of which make contracts for public works. Congress was legislating with respect to all the departments, the entire Government service. In this connection we hope it is not improper to invite this court's attention to War Department Bulletin No. 7, dated March 11, 1914, on this statute, and in which is found the following language:

> "*Final settlement:* The Department treats as the date of final settlement mentioned in said acts the date on which the *final payment* under the contract is made." (Italics ours.)

If the statute is to receive a liberal construction, *so as to advance its purpose,* as contended for by the other side, "final settlement" will be construed to refer to the *last* rather than the *first* possible date, *so as to give the Government the full benefit of the protection for which the act was passed.*

We submit, however, that subcontractors as a class are not so much interested in whether final settlement is construed to refer to an early or a late step in the proceeding, as they are in having it fixed as some step common to all departments which can be easily and definitely determined. If this court should hold the alleged settlement letter of August 21 to be final settlement, the question would not be settled as to other departments, whose proceedings may have no step exactly corresponding to this. We believe it would also be unfortunate if the result of this court's decision should be to make it necessary to go into the Government files in each case and determine the *earliest period* at which the executive officers and the contractor agreed on the amount which happened to be finally paid. It would be very easy to determine, however, the date of the disbursing officer's final check, or the date of the auditor's final settlement, and as above shown, these steps are common to all Government departments.

III.

The Court Was Without Authority to Render Judgment for the Benefit of the Carolina Electrical Company.

(Assignment 8; Record, p. 73.)

The Carolina Electrical Company neither joined in the original complaint nor intervened in the action. The Electrical Engineering & Contracting Company joined as plain-

tiff in the original suit, as alleged assignee of the Carolina Electrical Company, but the trial court held that it failed to prove a valid assignment and was, therefore, without right to recover. There was, therefore, we submit, no plaintiff before the court in whose favor judgment could be given. Obviously judgment could not be given to the Carolina Electrical Company without first making it a party to the proceedings. It could not be made a party at the time judgment was rendered, November 10, 1913, because the statute of limitations had then run. Where an amendment *adds a new party, the action is not commenced as to such party until the filing of the amended complaint.* Henry Miller's Heirs *vs.* Jacob M'Intyre *et al.*, 6 Pet., 61. This case was cited with approval in Hewitt *vs.* Penn. Co., 24 Fed., 370, dismissing suit for infringement of patent where amendment including proper plaintiff was not filed before patent expired; Miller *vs.* Holt, 99 Ala., 209, holding where new defendants are brought in by amendment, statute runs up to date of filing same, and numerous other cases to same effect cited in Rose's notes on the case of Miller's Heirs *vs.* M'Intyre, *supra.*

There was at the time of judgment *no existing right of action in anybody* for this claim. The holding of the trial court that the proceeding in this case was a sufficient filing of the claim on behalf of the Carolina Electrical Company to entitle it to recover under the statue was obviously in error. The statute provides that—

> "any creditor may file his claim in such action and be made a party thereto *within one year from the completion* of the work under said contract and not later."

The Carolina Electrical Company did not file its claim. The claim in question was filed by another. The Carolina Electrical Company was not made a party to the suit. The Electrical Engineering and Contracting Company, alleged assignee, was made a party to this suit instead. We respectfully submit that the trial court was therefore without

authority to give judgment in the name of and for the benefit of the Carolina Electrical Company.

But the defendants in error contend that this was merely the case of a substituted party, and cite M., K. & P. R. Co. *vs.* Wulf, 226 U. S., 576, and McDonald *vs.* State of Nebraska, 101 Fed., 171. The Wulf case was a plain case of amendment, justified under the law with respect to amendments. The proper party had sued, but in her individual capacity instead of her capacity as personal representative. The court allowed the amendment to her representative capacity, for the reason that she "was the sole beneficiary of the action" in either case. That is not the case at bar. Here the *wrong party* has sued, and the court attempted to give judgment in the name of and for the benefit of the supposed right party.

Neither is this case like the McDonald case. In the McDonald case the State had a claim, and its treasurer sued on it, but in his own name. This was error. The action should have been in the name of the State, but the court allowed the substitution of the State as plaintiff. There the treasurer was obviously suing for the benefit of the State, as the agent or official representative of the State. The substitution went merely to the form, not to the substance. But in the present case the Electrical Engineering and Contracting Company was not suing for the benefit of the Carolina Electrical Company, but for its own benefit and in its own right. It is no different from any other case where the plaintiff fails to show his right to recover.

The case is rather analogous to First National Bank *vs.* Shoemaker, 117 Pa. St., 94: 2 Am. St. Rep., 649, where it was held that in an action by the payee of a non-accepted draft against a bank, it was error to allow an amendment of the record substituting the drawer as the legal plaintiff for the use of the payee, particularly when the drawer's right of action against the bank (as the Carolina Electrical Company's right of action under the bond here) had been

barred by the statute of limitations at the time of the amendment.

If the proceeding here followed was proper, we submit, there is no reason why a person could not speculate in this class of litigation; that is, a person having knowledge of a claim soon to be barred and knowing the owner thereof to be either absent or in ignorance of this fact, could institute suit on a pretext of an assignment, and after the statute had run could make terms with the owner, whose claim otherwise would have been barred, and who could then come in at the trial or afterwards, prove title and collect the judgment. We submit the action of the lower court on this claim was error and the judgment should be reversed.

IV.

The Amended Complaint and Petitions Did Not Relate Back to the Commencement of the Action.

(Assignments 6, 7, and 9; Record, p. 73.)

> "The power to amend must not be confounded with the power to create."
>
> Gagnon *vs.* U. S., 193 U. S., 451.

The test whether a complaint is or is not amendable is whether it omits some allegation essential to the existence of the cause of action, or does it allege substantially or inferentially all the elements necessary for the existence of the cause of action, but states them defectively, inaccurately, imperfectly or inartistically.

> Lilly *vs.* Railroad Company, 32 S. C., 142, followed in Coker *vs.* Monaghan Mills, 119 Fed., 706.

The time of completion and settlement of the contract being an essential element of the right of action created by the statute in question, its allegation in the complaint was

essential. It was not expressly alleged in the original complaint, nor could it be inferred from any other allegations therein, hence we submit that the district court erred in permitting the amendment. That a new cause of action cannot be introduced, *or a fatal and material defect corrected* after the statute of limitations has become a bar, has been so often recognized that no authorities need be cited.

As said in St. L. & S. F. R. Co. *vs.* Loughmiller, 193 Fed., 698:

> "What the petition of the plaintiff in this case before amendment failed to do was to present for the determination of the court in any manner or by any means a right of action conferred on him by the statute * * * which created a right of action in his favor and against the defendant * * *, and his petition before amendment having for this reason failed to assert and present a right based on the statute, the right was irrevocably lost by reason of his non-compliance with the condition on which the right was conferred by the statute."

The same rule was applied in Brinkmeier *vs.* Mo. Pac. R. R. Co., 224 U. S., 269

The case of Mo., Kan. & Tex. Ry. Co. *vs.* Wulf, 226 U. S., 570, relied upon by the district judge as authorizing this amendment, was distinguished from U. P. Ry. Co. *vs.* Wyler, 158 U. S., 285, and is distinguishable from the case at bar, in that there the amendment allowed "introduced no new or different cause of action, *nor did it set up any different state of facts as the ground of action*, and therefore it related back to the commencement of the suit." (See 226 U. S., 576.)

In the case at bar, the additional fact as to the time of the completion and settlement of the contract, not alleged in the original complaint and essential to the existence of the cause of action, is for the first time alleged in the amended complaint, authorized to be served and filed, in October, 1913, more than one year after the alleged date of the settlement (see amended complaint, par. 14, Record, p. 20), and

after the expiration of the period within which an action might be brought. This case is on all fours in this respect with Brinkmeier *vs.* Mo. Pac. Ry. Co., *supra.*

Respectfully submitted,

BYNUM E. HINTON,
Attorney for Illinois Surety Co.,
Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 176

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, PARTNERS, TRADING UNDER THE FIRM NAME OF FAITH GRANITE COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR

(24,268)

The R. L. Bryan Company, Printers, Columbia, S. C.

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BRIEF FOR DEFENDANTS IN ERROR

The questions presented in this case are:

I. WAS THE ACTION BROUGHT BEFORE THE EXPIRATION OF SIX MONTHS FROM THE COMPLETION AND FINAL SETTLEMENT OF THE CONTRACT?

II. WAS THE AMENDMENT OF THE PLEADINGS AFTER THE EXPIRATION OF ONE YEAR FROM THE COMPLETION AND FINAL SETTLEMENT OF THE CONTRACT AUTHORIZED?

III. WAS THE COURT AUTHORIZED TO RENDER JUDGMENT FOR THE CAROLINA ELECTRICAL COMPANY—A SUBSTITUTED PARTY?

IV. IS THIS AN ACTION AT LAW OR IN EQUITY?

STATEMENT.

This was an action commenced by the plaintiff on March 6, 1913, (Record, page 48), under the Act of Congress of August 13th, 1894, as amended by the Act of February 24, 1905, giving to subcontractors the right to sue upon the bond of a contractor. Notice for other creditors was published as provided in the Act, and under this notice E. J. Erbelding duly filed and served a petition of intervention on the plaintiff and on the defendants on April 26, 1913 (Record, page 8); and on June 27, 1913 (Record, page 9), Holly & Dyches filed and served their petition of intervention. The defendants appeared on the 4th day of April, 1913 (Record, page 7), and filed and served separate answers. And the defendants each also duly served separate answers (Record, page 11) to each of the petitions for intervention, denying the facts set forth in the petitions.

The decision of the Circuit Court of Appeals appears in the Record, pages 65-70, and is reported in 215 Fed., 334-40; 131 C. C. A., 476-82.

1. LIMITATIONS—COMPLETION OF CONTRACT—FINAL SETTLEMENT. On August 21, 1912 (Record, pp. 38-9), the Supervising Architect made report to the Secretary of the Treasury that the chief of the Technical Division of his office had certified that all work embraced in the contract had been completed, and that after certain deductions for delays, he recommended that there was due to the contractor and that authority be given for the payment to said contractor of $3,999.01. This report was approved the same day by the Assistant Secretary of the Treasury, and on August 23, 1912 (Record, pages 39-40), a statement was made and forwarded in a letter to the Custodian of the postoffice at Aiken, S. C., and a similar letter (Record, pp. 40-1) was sent by the same officer to the contractor, Mr. Stannard.

On the 26th day of August, 1912 (Record, pp. 41-2), a statement was made out in favor of Mr. Stannard for this amount, and he certified at the bottom of it **that it was correct** and that payment therefor had not been received.

On August 24, 1912 (Record, page 43), the contractor, Stannard, wrote a letter to the Supervising Architect of the Treasury, acknowledging a letter of August 20th (which we think was statement of August 21st), stating that the settlement was to be for **$3,999.01 "in full settlement,"** and there is no objection or

suggestion of dissent from this in the letter. This letter was received by the Supervising Architect on August 26, 1912.

And on August 31, 1912 (Record, page 44), the contractor, Stannard, wrote to one of the subcontractors advising "that final voucher has just reached me for postoffice building, Aiken, S. C., and I have signed and returned it to Washington for check." And the District Judge found that the final adjustment and settlement was had on August 26, 1912 (Record, page 49).

2. LIMITATIONS—AMENDMENT. Just after the defendants appeared and answered, on April 4, 1913, they entered into an agreement with the plaintiff on April 5th, 1913 (Record, page 7), "that the cause be placed on Calendar 1 for trial of issues of fact raised by said answer; and assigned to be called for trial at the next ensuing regular term of the United States District Court to be held in Columbia." **After the expiration of twelve months** from the completion and final settlement of the work, September 22, 1913, but shortly prior to the time set for the trial of the cause, the defendants gave notice of a motion to dismiss the complaint upon the ground that the complaint did not allege and show on its face that the completion and final settlement was more than six months prior to the commencement of the action and within one year before the commencement of the action; and the complaint did not allege any completion and final settlement between the contractor and the government; and that the action was one in equity and not at law (Record, p. 12).

The original complaint filed by the plaintiff did not allege the date of completion and final settlement, but did allege, paragraph 11 of the complaint (Record, page 6), "that on the 16th day of November, 1912, plaintiff made the affidavit required by the statute and procured from the Secretary of the Treasury certified copies of the original contract and bonds."

In the intervention petition filed by E. J. Ehrbelding, it is distinctly alleged, paragraph 2, "that the contract was completed on the 20th day of July, 1912, and final settlement authorized by the Treasury Department on August 21, 1912" (Record, p. 8).

Upon this motion to dismiss, the Judge, by his order of October 4, 1913, held that it was necessary to allege the date of final settlement and completion (Record, page 14), but that "these limiting conditions are no part of what may be said to be the fundamental right of action given by the statute." And that: "In the opinion of the Court, therefore, while the facts required by the statute as showing that a final completion and final settlement of the contract with the United States was had, and that the action has been

brought within the period prescribed by the statute, are not as clearly and amply stated as they should be, yet a cause of action is sufficiently pleaded in the complaint to permit it to be made more ample and sufficient in all respects by the addition of complete allegations to this effect by way of amendment, under the rule upheld by the Supreme Court of the United States in the case of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S., p. 570" (Record, p. 15).

The Court, thereupon, permitted the plaintiffs and intervenors to amend the original complaint and the petitions of intervenors by showing the date of completion and final settlement, and also by showing that the United States had brought no action. The defendants duly excepted to this order, and, after the amendment, again raised an issue upon the trial as to whether the action was brought within the proper time.

3. SUBSTITUTED PARTY. The plaintiff, Electrical Engineering & Contracting Company, set up a claim, paragraphs 10 to 13 of the complaint (Record, pages 6-7), for conduit and wiring system furnished and installed by Carolina Electrical Company, and also set forth that this claim of the Carolina Electrical Company was now owned by the Electrical Engineering and Contracting Company. Testimony was offered as to the charter of the Carolina Electrical Company (Record, pages 31-38), and as to the incorporation of the Electrical Engineering and Contracting Company; and of amendment to the incorporation of Carolina Electrical Company.

Plaintiff also offered an order of the Superior Court of Wake county, State of North Carolina, in the case of certain creditors of Carolina Electrical Company, appointing a receiver, authorizing him to sue for any and all debts of the Carolina Electrical Company, and to take charge of and take into his possession all property of this company. This order is dated October 21, 1912 (Record, pages 45-6).

The District Judge found (Record, pages 50-1) that there was due to the Carolina Electrical Company the debt as set forth in the complaint, $498.69, but it had not been sufficiently proved that the receiver of the company had a right to assign it to the Electrical Engineering and Contracting Company, and that the claim was sufficiently filed, and that the Carolina Electrical Company was entitled to recover this sum, the judgment to be paid "only to such person as may be authorized by law to receive it for them."

STATUTE. So much of the statute, 28 Stat. at L., 278, Chap. 280; U. S. Comp. St., 1901, p. 2523; 33 Stat. at L., 811, Chap. 778;

U. S. Comp. St. Sup., 1909, p. 948, as is material to the points raised here is (italics ours):

> If no suit should be brought by the United States within *six months from the completion and final settlement of said contract*, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor, *it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later: And provided, further*, That where suit is so instituted by a creditor or by creditors, *only one action shall be brought, and any creditor may file his claim in such action*, and be made party thereto within one year from the completion of the work under the said contract, and not later.

ARGUMENT.

SPECIFICATION I.

ASSIGNMENTS OF ERROR 1-5.

LIMITATION—MEANING OF COMPLETION AND FINAL SETTLEMENT.

Under the plaintiff's assignments of errors, Nos. 1, 2, 3, 4, 5, the plaintiff raises the question as to what is meant by the term "final settlement," used in the statute. There is no question but that the contract was completed more than six months before the commencement of the original action. But the defendants contend that the final settlement was not made until the check for $3,999.01 was

issued on September 11, 1912 (Record, page 41). And that the action having been commenced on the 6th day of March, 1913, was commenced within six months from such final settlement. So that the question is as to whether the term "final settlement" means payment or a casting up of accounts, an adjustment and agreement between the parties or a determination by the government as to the amount due. Settlement may mean, and is sometimes used to mean, payment; but we respectfully submit that it is a much broader term; it does not necessarily mean payment, but in its generally accepted meaning, is an adjustment or agreement between the parties as the conclusion of matters between them. If the statute was used in the sense of payment, and if it had been so intended, the word "payment" would have been used instead of settlement.

The question has not been presented directly to this Court, although it has been before other Courts, and the Circuit Court of Appeals for the Second Circuit had the question before it and rendered a decision similar to that rendered in the case at bar at about the same time that this case was decided. And while neither Court seems to have had its attention called to the case pending in the other, both reached similar conclusions by unanimous decisions.

In the case of *U. S.* v. *Robinson,* 214 Fed., 38, 130 C. C. A., 434-5, the Court had before it this question in a case where the Supervising Architect of the Treasury made a report July 1st, 1908, recommending final settlement after making certain deductions for overtime damages, just as in our case, and this was approved in writing by the Secretary of the Treasury on February 10, 1909. The Court held that a suit begun after the expiration of six months and within one year from said date of February 10, 1909, was instituted within the proper time and the Court uses this language:

> In determining the time when materialmen may begin suit it would not do to fix it at some day "after complete performance" merely. Defective work, damages for delay, and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to "complete performance of the contract and *final settlement thereof.*" We take it that these italicized words refer to the *time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is,* without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way.

Six months after date, materialmen may begin suit. This construction protects the government against the defect of the old act, viz., that its suit to recover might prove barren, because the money is gone. We can see no reason why Congress should have provided that, when the government claims nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the government for having underpaid him reaches a conclusion. Such suit can in noway affect the fund provided by the bond out of which the government might have satisfied its claim, if it had any. In other words, we see no reason for holding that the final settlement must be mutual, in cases where the government makes no claim against the contractor. * * *

What it had in mind was *such a determination as to its rights,* by the proper government officers, as might fairly be taken by all persons interested as an authoritative anouncement that the government was not a claimant to any part of the proceeds of the bond. When such a determination has been made and six months have elapsed thereafter, then the others interested in the fund may bring their suit.

In the case of *Stitzer* v. *U. S.*, 182 Fed., 208, 105 C. C. A., 55-6, the Court construes the final settlement as the time when the amount due on the contract is no longer in dispute.

In the case of *U. S.* v. *Winkler,* 162 Fed., 401, arising under this statute, the Court, speaking through District Judge Ray, of New York, gives this definition to these words:

> The statute quoted seems to contemplate that in all cases the United States having entered on the work and made a contract for its execution will see that the work is completed; that, when the United States is compelled to complete the work by reason of the failure of the contractor for any reason so to do, this is "the complete performance of said contract." It also seems to contemplate that, when the work is completed by the United States, THE COST OF DOING THE WORK WILL BE ASCERTAINED, THE AMOUNT PAID THE CONTRACTOR ASCERTAINED, etc., and the amount of damages sustained by the United States ascertained, whereupon the United States may or may not sue the surety on the bond. The statute contemplates that this will be done in every case. THIS IS WHAT IS MEANT by the words "complete performance of the contract," and by the words "FINAL SETTLEMENT THEREOF."

And in the recent case of the *U. S.* v. *Bailey*, 207 Fed., 783-4, District Judge Bourquin passes on this very point:

> "Performance" and "final settlement" are not synonyms. The first is the agreed work done; THE SECOND IS THE ASCERTAINMENT OR ADJUSTMENT OF THE BALANCE OF RIGHTS AND LIABILITIES ARISING THEREFROM—IN THIS CASE, DETERMINATION BY THE UNITED STATES OF THE BALANCE DUE THE CONTRACTORS. THIS LATTER WAS NOT ACCOMPLISHED UNTIL THE CONTRACTOR'S ACCOUNTS WERE SETTLED AND CERTIFIED BY THE AUDITOR AFORESAID. When the contract was entered into the law was (it is part of the contract), and now is, that all claims, demands, and accounts wherein the United States is concerned shall be *settled and adjusted* in the Treasury Department. Section 236, Rev. St. (U. S. Comp. St. 1901, p. 130). To that end, the Third Auditor of said department is designated as Auditor for the Interior Department, to receive, examine, settle and certify all accounts relating to the department last mentioned, that Treasury warrants may issue for amounts or balances due claimants. Act July 31, 1894, c. 174, 28 Stat., 205-207 (U. S. Comp. St. 1901, pp. 148, 149).
>
> When this is done, and not until then, in respect to government contract performed, there is final settlement thereof, THOUGH FURTHER TIME BE NECESSARY FOR MERE MINISTERIAL ACTS, TO ISSUE AND DELIVER WARRANTS. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act, February 24, 1905, aforesaid. And from *the date of said Auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced, begins to run.*

A similar construction is given to the same clause by the District Court of Massachusetts in *U. S.* v. *Mass. B'd & Ins. Co.*, 215 Fed., 243-4.

GENERAL DEFINITION OF FINAL SETTLEMENT. We respectfully submit that this interpretation accords with the general definition and understanding of the words "final settlement." Bouvier thus defines it:

"An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full."

And Century Dictionary:

"The act or process of determining or deciding; the removal or reconciliation of differences or doubts; the liquidation of a claim; adjustment; arrangement; as the settlement of a controversy; the settlement of a debt."

And the Supreme Court of Wisconsin, in *Rose* v. *Bradley,* 91 Wisc., 619:

"The learned Circuit Judge said to the jury 'a settlement is the looking over of the mutual accounts of two or more persons who have had mutual business transactions and striking a balance between them.' We apprehend that the word 'striking' was used in the sense of 'agreeing upon,' and it was probably so understood by the jury; and as so understood is free from criticism, though, as given, it was not strictly correct."

And the Supreme Court of Alabama, in *Sims* v. *Waters,* 65 Ala., 442:

"A partial settlement, when founded on regular proceedings, is only *prima facie* evidence of its own correctness, throwing a laboring oar onto the hands of the party impeaching it. A final settlement is, as its terms import, a conclusive determination of all the past administration, the unimpeachable evidence of its own verity, if founded on regular proceedings, in the absence of fraud."

It is thus defined by the Court of Oregon, in *Phipps* v. *Willis,* 96 Pac., 866:

"The word 'settle' has an established legal meaning, and implies a mutual adjustment of accounts between different parties, and an agreement upon the balance."

And in *Toombs* v. *Stockwell,* 131 Mich., 633, this definition is given:

"The term settled does not necessarily mean payment. One lexicographer defines 'settle' to mean 'to adjust differences, claims or accounts, come to an agreement' (Cent. Dict. & Ency.). Another says: '*Settle' implies the* mutual adjustment of accounts, and an agreement upon the balance. The conversation therefor, between the parties was, therefore, competent in order to explain what was meant by the term."

See to the same effect, also:

Anzerias v. *Naglee,* 74 Cal., 60.
Greene County v. *Light,* 74 Ark., 41.
Miller v. *Ins. Co.,* 113 Iowa, 211.
Jackson v. *Ely,* 57 Ohio St., 450.
Pomeroy v. *Mills,* 37 N. J. Eq., 578.
Albers v. *Merchts. Ex.,* 140 No. App., 446.
Roberts v. *Spencer,* 112 Ind., 85.
Vol. 5, Words & Phrases, 6446-47, and cases.

DEPARTMENT CONSTRUCTION. Sec. 236 of the Rev. Statutes provides:

> All claims whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be **settled and adjusted** in the Department of the Treasurer.

It is clear that this statute used the word "settlement" in the form of adjusting and ascertaining.

7 Fed. Stat. Ann., 362-3, and cases.
U. S. v. *Bailey,* 207 Fed., 783-4.

It is thus made the duty of the department to make this settlement, and the settlement made by the department and its rulings and constructions of the statutes are entitled to and are given great weight by the Courts.

U. S. v. *Cerecedo Hermanos Y. Co.,* 209 U. S., 339, 52 L. Ed., 822.
Jacobs v. *Prichard,* 223 U. S., 214, 56 L. Ed., 409.
U. S. v. *Hammers,* 221 U. S., 225-6, 55 L. Ed., 714.

The language of the Court in the first case cited above is:

> We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution.

The department, which, so far as this case is concerned, is an entirely disinterested person, has made a rule upon this point and has given a construction to the term "final settlement," which, if the terms were doubtful, we respectfully submit, would be entitled to great weight in determining this doubt. This ruling has been issued by the department (Record, pp. 44-5) in a circular in reference to these very matters, and is as follows:

FINAL SETTLEMENT.

The department treats as the date of final settlement mentioned in said Acts the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly. (So far as known, the correctness of this view as to the true date of final settlement has not been decided by the Courts.)

FINDINGS OF FACT BY THE COURT. The parties, plaintiff, intervenors and defendants, by a written stipulation duly signed, waived a jury trial and the case was heard by the Judge (Record, page 30); and he made and filed his findings of fact and conclusions of law as set forth in the Record, pages 47-51. And his finding upon this question, page 49, of the Record, is: "In the present case I find as a conclusion of fact that final adjustment and settlement in the meaning contemplated by the statute was had on the 26th of August, 1912, and that the present action, therefore, was not brought before the expiration of six months from the date of final settlement."

The Court also found, at page 48 of the Record, that the action was commenced on March 6, 1913.

The Revised Statutes, Sections 649 and 700, provides for such waiver of jury trials. Under these provisions the finding of the Court has the same effect as the verdict of the jury.

It is true that these provisions apply to the Circuit Court, and prior to the enactment of the Judicial Code of 1912, the effect of such a finding by a District Judge was the same as a consent arbitration and not reviewable.

Campbell v. *Boyreau*, 62 U. S., 223, 226, 16 L. Ed., 96.
Campbell v. *U. S.*, 224 U. S., 105, 56 L. Ed., 686.

The Judicial Code, Sec. 297, does not repeal either Section 649 or 700 of the Revised Statutes, and, on the contrary, Section 291 of this Code, provides that all the powers conferred by law upon the Circuit Courts at the time of the Act, shall be deemed to refer to and confer such powers upon the District Courts.

These findings of the District Judge, so far as they are findings of fact, are conclusive and final.

U. S. v. *U. S. Fid. & Guaranty Co.*, 236 U. S., 512, 59 L. Ed.
Nashville Interurban Ry. v. *Barnum*, 212 Fed., 634, 129 C. C. A., 173-4.

SPECIFICATION II.

ASSIGNMENTS OF ERRORS 6, 7, AND 9.

LIMITATIONS—AMENDMENT.

As shown in the statement above, it will be seen from the Record that the plaintiff in error, defendant below, after the expiration of more than a year from the completion of the work and the final settlement, to wit, on September 22, 1913, Record, page 12, and after the case had been set down for trial by the Court under an express stipulation from this same plaintiff in error, moved to dismiss the action for want of essential allegations in the pleadings.

Upon the hearing of this motion, the District Judge, on October 4th, 1913, sustained it, but authorized the defendants in error, plaintiff and intervenors below, to amend their pleadings by inserting allegations showing that more than six months had elapsed from the completion and final settlement of the contract and that the United States itself had not brought a suit, and that the suit was brought within one year (Record, pages 14-16). This ruling of his Honor constitutes the basis of all or part of the sixth, seventh and ninth assignments of error. The contention of the plaintiff in error, being that the Court was without power to allow such amendment.

Conceding that under the decisions of this Court in *Baker Contr. Co.* v. *U. S.*, 204 Fed., 390, 122 C. C. A., 567, and *Stitzer* v. *U. S.*, 182 Fed., 513, 105 C. C. A., 54; *U. S.* v. *McCord*, 233 U. S., 162, 58 L. Ed., 897; *U. S.* v. *Schurman* (District Ct., Idaho), 218 Fed., 917, the limitations and conditions prescribed in the statute are conditions necessary to the plaintiffs' and intervenors' rights to recover; and that if the facts as developed in the case do not bring the parties within the limitations and conditions prescribed in the Act, it is fatal. Yet, whether the omission to allege these facts and conditions is of such nature that it cannot be cured by amendment is an entirely different question.

(a) SPIRIT AND INTERPRETATION OF ACT. It is the settled policy of the Court, as announced through the highest tribunal of the land, that this Act shall receive a liberal construction so as to advance its purpose.

Hill v. *Am. Surety Co.*, 200 U. S., 203, 50 L. Ed., 440.
Monkin v. *U. S.*, 215 U. S., 539, 54 L. Ed., 317.
Title Guaranty Co. v. *Crane*, 219 U. S., 33-4, 55 L. Ed., 77.
U. S. v. *N. Y. Steam Ftg. Co.*, 235 U. S., 327, 59 L. Ed.
Title Guaranty & Tr. Co. v. *Eng. Works*, 89 C. C. A., 624-6, 163 Fed., 168.

Equitable Surety Co. v. *U. S.*, 234 U. S., 455-6, 58 L. Ed., 1397.

The language of the Court in the Hill case above is:

> The Courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of the building to be owned and enjoyed by those who profit by the contribution of such labor or materials.

And again:

> Statutes are not to be so literally construed as to defeat the purpose of the Legislature. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." *United States* v. *Freeman*, 3 How., 556, 11 L. Ed., 724. "The spirit as well as the letter of the statute must be respected, and where the whole context of the law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid that intent."

(b) RIGHT TO AMENDMENT. The amendment which the plaintiffs and intervenors asked to make, and which the Court permitted, was an amendment in the interest of truth; to make the pleadings set out more fully the actual facts upon which the action was based. It would seem to the writer that at this day no Court could refuse a request of this nature. But we respectfully submit that it is in accordance with the letter and spirit of the statute, Sec. 954, Rev. Statutes, and the judicial interpretation thereof. This statute is:

> No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such Court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such Court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

The statute is a beneficent one intended to promote justice and is to be and is liberally construed.

McDonald v. *State of Neb.*, 41 C. C. A., 284, 101 Fed., 171.
4 Fed. Stat. Ann., 597, and cases.
Vol. II, Sup. Fed. Stat. Ann., 1443-4.
T. & P. R. Co. v. *Cox*, 145 U. S., 593, 36 L. Ed., 831, 833.
M. K. & T. R. Co. v. *Wulf*, 226 U S., 576, 57 L. Ed., 363.
A. & P. R. Co. v. *Laird*, 156 U. S., 401, 41 L. Ed., 488.

The language of Justice Caldwell, in the McDonald case, on this point, is:

> This Act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had heretofore been interposed to obstruct the administration of justice as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the Federal Courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the Supreme Court of the United States grasped the object and purpose of this enactment. In referring to this section of the Judiciary Act, the Supreme Court of the United States, speaking by Mr. Justice Story, says:
>
> "The authority to allow such amendments is very broadly given to the Courts of the United States by the thirty-second section of the Judiciary Act of 1789, c. 20 (now Section 954, Rev. St., U. S.), and quite as broadly, to say the least, as it is possessed by any other Courts in England or America, and it is upheld upon the principles of the soundest protective policy." *Matheson's Adm'rs* v. *Grant's Adm'rs*, 2 How., 263, 281, 11 L. Ed., 261.

And Mr. Justice Miller is quoted in the same case, thus:

> "This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the Federal Courts, than any of the modern Codes. It is founded on common sense and justice, and ought to be regarded by the Circuit Courts as mandatory."

This was a case in which an action was brought by the Treasurer of the State, and a demurrer was sustained upon the ground that the action should have been brought in the name of the State, but an amendment was allowed substituting the same.

In the case of *M. K. & T. R. Co.* v. *Wulf*, action was brought by a parent in her individual capacity to recover damages for the death of an unmarried child, caused by an interstate railway carrier; such action could not be maintained under the Employers' Liability Act; but it was absolutely essential that the action be brought by the personal representative. An amendment was permitted allowing the administrator to maintain the action, although the two years statute of limitation had expired before the amendment. The Court, speaking through Mr. Justice Pitney, says:

> The amendment was clearly within Section 954, Rev. Stat., U. S. Comp. Stat. 1901, p. 696.
>
> Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance (*Stewart* v. *Baltimore & O. R. Co.*, 168 U. S., 445, 42 L. Ed., 537, 18 Sup. Ct. Rep., 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related back to the beginning of the suit.

(c) LAW OF THE UNITED STATES governs and not the law or rules of the particular State.

Mexican Cent. Ry. Co. v. *Duthie*, 189 U. S., 78, 47 L. Ed., 719.
Van Doren v. *Penn. Ry. Co.*, 35 C. C. A., 290, 93 Fed., 260, and cases.
Manitowoc Matting Co. v. *Feuchtwanger*, 169 Fed., 983.

The language of the Court in the Van Doren case is:

> Circuit Courts, subject to the requirement of such general conformity, may in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the Supreme Court "regulate their own practice as may be necessary or convenient for the advancement of justice," and permit parties to "amend any defect in the process or pleadings, upon such conditions," as they shall, in their discretion and by their rules, prescribe. The Circuit Courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants. Nor where such results would follow are their powers with respect to practice or pleading directly or indirectly limited or affected by any judicial interpretation by a State Court of a State statute relating to such matters.

(d) DISCRETIONARY—NOT REVIEWABLE. "The statute invests the Courts of the United States with large discretion in permitting the correction of defects in pleadings and process by amendment, and rulings of this character constitute no ground for reversal unless the discretion is grossly abused."

Gr. Northern Ry. Co. v. *Herron*, 68 C. C. A., 601, 136 Fed., 49.
Mexican Cent. Ry. Co. v. *Duthie*, 189 U. S., 78, 47 L. Ed., 716.

AMENDMENT TO SHOW JURISDICTION. "Where failure of pleadings to show jurisdiction is raised in the trial Court, it should permit amendment for the purpose of remedying the defect. Where the Supreme Court has reversed and remanded the cause for failure of record to show jurisdiction in the lower Court, the latter may permit amendment to show that jurisdiction really existed when suit was brought, if the facts warrant it. Or the Supreme Court in its mandate may direct that amendment be permitted."

Rose's Code of Fed. Procedure, Vol. I, Sec. 9h, p. 65.
Howard v. *DeCardova*, 177 U. S., 614, 44 L. Ed., 910.
King Bridge Co. v. *Otoe Co.*, 120 U. S., 227, 30 L. Ed., 624.
Springstead v. *Bank*, 231 U. S., 542, 58 L. Ed., 356.
Menard v. *Goggan*, 121 U. S., 253, 30 L. Ed., 914.
Metcalf v. *Watertown*, 128 U. S., 590, 32 L. Ed., 544.
Campbell v. *Johnson*, 92 C. C. A., 566, 167 Fed., 102.

It is further to be noted upon this question of amendment that the intervention petitions which were a part of the record in the case, clearly alleged and pointed out the date of final settlement and that date as being more than six months prior to the commencement of the action. The Court had this before it on the motion, and we respectfully submit that we are entitled to rely upon it in sustaining the complaint.

RULE. We respectfully submit that the rule to be drawn from all our authorities is that where a right of action existed at the time the action was commenced by the parties, and the jurisdictional facts actually existed, no party will be turned out of Court because of his failure to allege them; he will be permitted to amend his pleadings in accordance with the facts and the truth of the case.

The application of this principle will reconcile the cases in which the amendments have been allowed, cited above, with those where they have been disallowed. In the latter class, we find the case of *U. S.* v. *McCord*, 233 U. S., page 157, 163-4, where the action was brought before the expiration of six months, a fact which was held to be a condition precedent to the right to maintain it, and the Court held that an amendment, after the expiration of the twelve months,

could not save the action; for the rights which were necessary as a basis for the action, did not exist at the time of the commencement of the action, as they did in our case, and in the cases where the amendment has been allowed.

(e) AMENDMENT RELATES BACK. Whether we consider the conditions prescribed by the statute in the nature of a statute of limitation or as an essential condition to the success of plaintiff's right, any amendment relates to the commencement of the action, and the limitation of six months and one year, respectively, runs to the original commencement of the action and not to the date of the amendment. See cases cited above under (b) and (d). Also:

Patillo v. *Allen West Com. Co.*, 65 C. C. A., 519, 131 Fed., 680, and cases.

Armstrong, Cook & Co. v. *Merchants Refining Co.*, 107 C. C. A., 99, 184 Fed., 199.

McDonald v. *State of Neb.*, 41 C. C. A., 287-8, 101 Fed., 171.

Van Doren v. *Ry.*, 35 C. C. A., 293, 93 Fed., 271, and cases.

The doctrine announced by the Court in the McDonald case is thus set forth:

> The doctrine in this case is reaffirmed by the same Court in *Sanger* v. *Newton*, 134 Mass., 308, where it is said:
> "The fact that the three years within which an original petition could have been filed have elapsed furnished no ground for refusing the amendment. But rather a reason why it should be allowed, as otherwise substantial justice will be defeated."

In *Van Doren* v. *Railroad Co.*, the suit was brought in the name of Laura L. Van Doren, as administratrix of her deceased husband, and subsequently, and after the statute of limitations had run against a suit in her name as a widow, she applied to the Court for leave to amend the declaration by declaring as widow, instead of administratrix, of her deceased husband. The lower Court refused to allow the amendment, but this ruling was reversed by the Circuit Court of Appeals, that Court saying:

> "Substantial justice requires that such an amendment should be allowed as a second suit for damages for the death of Henry Van Doren would be barred by the one-year limitation in the Pennsylvania statute."

The language of the Court, by Judge Sanborn, in the Patillo case is:

> The rule of law upon this subject is that "an amendment to a petition which sets up no new cause of action or claim and

> makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point."

In practically all of the cases last cited above, and in most of those from the United States Supreme Court cited above under (b), the question of the bar of the statute of limitations arose under the contention that the statute ran until the date of the amendment, but the Court has uniformly overruled this contention in all the cases. This point was made in *T. & P. Ry. Co.* v. *Cox,* and in *M. K. & T. R. Co.* v. *Wulf,* and overruled.

DECISIONS ON THIS STATUTE. The only case which we can find throwing any light upon an amendment in reference to allegations required by this particular statute, are the cases of *Title Guaranty & Trust Co.* v. *Eng. Works,* 163 Fed. 168, 89 C. C. A., 628, and *Title Guaranty & Trust Co.* v. *Crane,* 219 U. S., 34, 55 L. Ed., 77. The language of the Court in the first case (affirmed in the second) is:

> It is said that application by affidavit to the department under whose direction the work of constructing the vessel was performed was a condition precedent to bringing the suit. The amended statute contemplates that the person who may wish to bring a suit shall file an affidavit of his claim with the department having charge of the work for which bond has been given, and obtain a certified copy of the contract and bond upon which right of action is given. The object of this requirement is to protect the department of the government which may be concerned from being required to give information upon any simple request as to the nature of the contract and bond under which the contractor may be performing his contract, and also to show good faith and interest in the subject matter. But we do not think that JURISDICTION IS LACKING, UNLESS SUCH AN AFFIDAVIT HAS BEEN FILED.

(f) RIGHTS OF INTERVENORS INDEPENDENT. While we most respectfully insist that the foregoing construction is the proper construction to give this statute in reference to the words "final settlement," and that the original complainants' suit was not prematurely filed, still, if the Court should hold that the statute should be given the construction contended for by the defendant, we submit that the intervention of E. J. Ehrbelding is in nowise jeopar-

dized and he is entitled to proceed to judgment in the name of the United States for his use.

Each claimant in the action on a contractor's bond given under this statute, has a distinct cause of action. *United States* v. *Mass. Bonding Co.*, 198 Fed., 927; *Title Guaranty Co.* v. *Crane*, 219 U. S., 24; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed., 168.

Suppose a materialman or subcontractor should file a suit thirty days after completion and final settlement of a public contract, which on its face sets out a cause of action alleging every material allegation required under this statute, after a delay, we will say of six months from the date of filing, other materialmen and subcontractors are then notified of the pendancy of this suit, what should they do? Could they ignore this suit and treat it as null and void? Suppose they did know, that as a matter of fact when it came down to a question of proof, the plaintiff could not prove an essential element of his case, to wit, that he had not waited six months from the final settlement before filing his suit, what should they do? Must they ignore the original suit in face of the specific provision that one suit only can be brought under this statute? Then, again, suppose a materialman or subcontractor knew that the original complainant, when it came down to a question of proof, could not show that he had furnished a dollar's worth of the material he was suing for, yet the suit on its face made a complete case, could he ignore the pendency of such suit and refuse to intervene therein?

We do not think the last question can be answered otherwise than in the nagative. If so, the failure to prove that the suit was not filed in time can have no more effect on the rights of the intervenor, Ehrbelding, than failure of the original complainant to prove any other essential fact in his case.

It has been held that the dismissal by a plaintiff of his cause of action, or a nonsuit as to the plaintiff, does not prevent an intervenor from having his rights adjudicated. 17 Enc. of Law (2 ed.), 185, 11 Enc. of Pleading and Practice, 509.

The Court in the case of *Poehlmann* v. *Kennedy*, 48 Cal., 207-8, in passing upon the effect of a nonsuit of a plaintiff on the questions raised by the intervention, the lower Court, having dismissed the intervention after nonsuiting the plaintiff, uses this pertinent language:

> But we think the Court erred in dismissing the intervention upon the ground that there was no action pending after the nonsuit had been granted. The intervenor was a party to the suit, claiming an interest in the matter in litigation adverse to

both plaintiff and defendant. As such party he was entitled to have the issues raised between himself and each of them tried and determined. The right could not be effected by the dismissal of the plaintiff's action.

We submit the rights of intervenors in this case are in nowise effected under this statute by a nonsuit of plaintiff. They certainly are adverse to the defendant and are in nowise beneficial to the original complainant.

The contention of counsel for defendant that the intervention of E. J. Ehrbelding has never been allowed by the Court, we submit is not tenable. The statute does not require any order of Court making an intervenor a party plaintiff. On the contrary, it is compulsory that every subcontractor and materialman make himself a party by coming in and setting up his claim, and if he fails to do so, he is forever barred. But if we are wrong in this position the defendant has waived any rights it may have had along this line by accepting service of the intervention and pleading to the merits (Record, p. 11). Even though the Court should hold that the original suit was void, we submit the intervention is good as an original suit against the defendants. We allege everything required under the statute to make a perfect case; it was filed after the expiration of six months from the final completion and settlement between Stannard and the United States of the original contract and within twelve months therefrom; the defendants acknowledged service thereof and filed defenses thereto, all of which was done after the expiration of the inhibited six months and within twelve months from the completion and final settlement. What other steps could we have taken if we had started out to file a separate suit, than the ones above enumerated?

The case of *U. S.* v. *McCord*, 233 U. S., 157, 164, does not conflict with this position because in that case, as the Court states, "Nor do we think that the intervention can be treated as an original suit. No service was made or attempted to be had upon it as required by the statute, when original actions are begun by creditors."

In our case, the petitions of intervenors were served upon the parties, defendants, now plaintiff in error, and they appeared and answered each of these intervention petitions taking issue on the merits thereof (Record, page 11).

SPECIFICATION III.

ASSIGNMENT OF ERROR 8.

SUBSTITUTED PARTY.

The 8th assignment of error is to the right of the Court to render judgment in favor of Carolina Electrical Company on the ground that it was not a party to the action. An examination of the record will show that the nominal party to the record was Electrical Engineering and Contracting Company, as assignee of the receiver of Carolina Electrical Company.

EVIDENCE. We take it that this assignment of error is based upon the idea that the Court was in error in admitting in evidence the certified copies of the charter and amendment thereto, set out at pages 31-8 of the Record, and certified copies of the Record of the order of the Superior Court of Wake county, North Carolina, in the case in which the receiver was appointed (Record, pages 45-6).

The ruling of his Honor in admitting in evidence the copy of the charter certified by the Secretary of State was based upon Section 906 of the Revised Statute (which is different from Section 905, which latter is applicable to judicial records). It provides for the admission in evidence of records from any public officer of the State, "by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal * * * or if given by such Governor, Secretary (of State), Chancellor, or keeper of the great seal, it shall be under the great seal of the State, territory or county in which it is made. And the said records and exemplifications so authenticated, shall have such faith and credit given to them in every Court and office within the United States as they have by law or usage in the Courts or offices of the State, territory or county, as aforesaid, from which they are taken."

3 Fed. Stat. Ann., p. 40.

Under the statutory law of North Carolina, which was offered in evidence in this case, it is provided by Section 1139 of the Revisal of 1905 how certificates of incorporation shall be signed and filed in the office of the Secretary of State, and recorded there, as also in the county in which the corporation has its place of business, "and said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or by the Clerk of the Superior Court of the county in which the same is recorded, shall be evidence in all Courts and places, and shall, in all judicial proceedings, be deemed *prima faice* evidence of the complete organization and incorporation of the company purporting thereby to have been established."

The copies of the records from the Superior Court of Wake county were certified by the Clerk and then by the presiding Judge, and again by the Clerk in exact accordance with Section 905 of Revised Statutes. Although not so shown in Record, p. 46, counsel admit certificates were proper. We do not see how this objection can be seriously pressed in view of the plain language of the statute.

The Court, however, held that the order appointing the receiver would not vest him with authority to assign and transfer a claim of Carolina Electrical Company to Electrical Engineering and Contr. Co., and for this reason declined to render the judgment in favor of the assignee (Record, page 51), but rendered judgment in favor of the original creditor, leaving it open to the assignee to furnish further evidence of its right to collect the judgment.

RIGHT TO SUBSTITUTE PARTY. Under authority of Section 954 of the Revised Statute, as well as the authorities cited above, the Court had a right, and it was its duty to render judgment in favor of the real party in interest without regard to matter of form, and to make such one a real party to the action.

M. K. & P. R. Co. v. *Wulf, supra.*
McDonald v. *State of Neb., supra.*

The Court, in the McDonald case above, through Mr. Circuit Judge Caldwell, says:

> But it has come to be the settled law that where, either by **mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake;** but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, **when the effect would be to let in the bar of the statute of limitations.**

SPECIFICATION IV.

ASSIGNMENT OF ERROR 10.

ACTION AT LAW OR EQUITY.

The tenth assignment of error raises the question as to whether the proceeding under this statute is an action at law or a suit in equity; a point raised by the motion of defendants on the 22d of September, 1913 (Record, page 12).

QUESTION RAISED TOO LATE. It will be observed that the plaintiff in error, defendant now, on the 5th day of April, 1913 (Record, pages 7-8), had entered into a stipulation after the answer to the merits, setting the cause for trial on Calendar 1, for trial of issues of fact raised by said answers. Calendar 1, under the practice of the Federal Court, following the practice of the State Court, is for issues of law and fact, to be tried by a jury in law cases. An objection to the proper jurisdiction of the Court should be made on the threshold of the case, and is too late after answer on merits, and the case set down for trial.

Sloss I. & S. Co. v. *S. C. & G. R. Co.*, 162 Fed., 546.
Acord v. *West Pocahontas Corp.*, 156 Fed., 1001.
Affirmed by Court of Appeals, 174 Fed., 1019, 98 C. C. A., 637.
And *certiorari* denied by this Court in 215 U. S., 607, 54 L. Ed., 346.
Farrington v. *Pittsburg*, 114 U. S., 143, 29 L. Ed., 114.
Brown v. *Lake Superior I. Co.*, 134 U. S., 534, 33 L. Ed., 1024.
Peale v. *Marian Cole Co.*, 190 Fed., 389 (D. C., Penn.).
T. & P. Ry. Co. v. *Cox*, 145 U. S., 603, 36 L. Ed., 832.
Eldorado Coal & Min. Co. v. *Mariotti*, 215 Fed., 54, 131 C. C. A., 362.

UNIFORM PRACTICE. An examination of the cases which have arisen under this statute, both in the Circuit Court of Appeals and in this Court, will show that with practical unanimity, outside of the cases noted below, the cases have come to the appellate Courts on writ of error, and while the question was not raised, they were treated as actions at law.

U. S. v. *Congress Const. Co.*, 222 U. S., 199, 56 L. Ed., 163.
U. S. v. *Boomer*, 183 Fed., 726, 106 C. C. A., 164 (8th Circuit).
Stitzer v. *U. S.*, 182 Fed., 513, 105 C. C. A., 51 (3d Circuit).
Baker Contr. Co. v. *U. S.*, 204 Fed., 390, 122 C. C. A., 561 (4th Circuit).

Eberhart v. *U. S.*, 204 Fed., 884, 123 C. C. A., 181 (8th Circuit).
U. S. Fidelity Co. v. *U. S.*, 209 U. S., 306, 52 L. Ed., 437.
Hill v. *Amr. Surety Co.*, 200 U. S., 197, 50 L. Ed., 437.
Mankin v. *Ludowici-Celadon Co.*, 215 U. S., 533, 538, 54 L. Ed., 315.
U. S. v. *Freel*, 186 U. S., 309, 312, 46 L. Ed., 1177.
U. S. Fid. & Guaranty Co. v. *U. S.*, 194 Fed., 611, 116 C. C. A., 187 (9th Circuit).
U. S. Fid. & Guaranty Co. v. *U. S.*, 204 U. S., 349, 51 L. Ed., 516.
Davidson Bros. etc. v. *U. S.*, 213 U. S., 10, 53 L. Ed., 675.
U. S. v. *N. Y. Steam Fitting Co. et al.*, 235 U. S., 327, 59 L. Ed.
U. S. v. *McCord*, 233 U. S., 157, 58 L. Ed., 893; Laine case, 218 Fed., 991, 133 C. C. A., 674.
U. S. v. *Robinson.*
U. S. v. *U. S. F. & Guaranty Co.*, 236 U. S., 512.

The Circuit Court of Appeals for the Second Circuit, in the case of *Illinois Surety Co.* v. *U. S.*, 212 Fed., 136, 129 C. C. A., 587, has held that it was a suit in equity.

In the case of *U. S.* v. *Stannard*, 207 Fed., 202-3, Judge Ray, of the District Court, in the same Circuit, held that it was an action at law, using this language:

> Is the action authorized by these statutes one at law or one at equity? Clearly, it is an action at law. It is an action on a contract and a bond, the contract made between Stannard and the United States, and the bond made between Stannard as principal and the Illinois Surety Company as his surety, as first parties, and the United States and all persons supplying Stannard with labor and materials in the prosecution of the work referred to in such contract and bond, as parties of the second part, or possibly we may better say between said principal and surety of the one part, and the United States of the second part, and for the benefit of such persons furnishing labor and materials. * * * The fact that all subcontractors having unpaid claims may come in and prove their contracts and claims, and establish the amount due them, and share *pro rata* in the judgment or recovery, does not make the case equitable in its nature, or deprive either party of his or its right to a trial by jury of all issuable facts.

The case of *Title Guaranty & Trust Company* v. *Crane Co.*, 219 U. S., 34, 55 L. Ed., 77, being the same case reported in 89 C. C. A.,

624-6, holds that each claimant is entitled to a docket fee of $10 under the provisions of Section 824 of the Revised Statutes. A reference to this section shows that the clause upon which the decision is predicated, reads: "In cases at law, when judgment is rendered without a jury, $10."

IMMATERIAL. We respectfully submit that, as the Court has determined in the present case, the question is entirely immaterial. The case was tried by consent of counsel and under a written stipulation by the Court (Record, page 30); that is to say, just as it would have been tried if it had been a suit in equity.

Rule 21 of the District Court of the District of South Carolina, promulgated by the same presiding Judge who tried the case, provides:

> If at any time it shall appear that an action commenced at law should have been brought as a suit on the equity side of the Court, it shall be forthwith transferred to the equity side and be there proceeded with, with such alterations in the pleadings as shall be essential.

Rule 22 of the equity rules, adopted by this Court, provides a corresponding right of transfer where an action at law is begun as a suit in equity. Hence, the only actual effect of this point would have been to nominally transfer the case from one docket to the other (*Illinois Surety Co.* v. *U. S.*, *supra*), while the trial would have been just as it was.

We most respectfully submit that the almost universal practice of bringing these cases as actions at law, and the silence of the Court in regard thereto, are weighty reasons for the Court to decline to give ear to that which is mere shadow when there is no substance or merit back of it.

Respectfully submitted,

PIERCE BROTHERS,
JOHN. L. RENDLEMAN,
D. W. ROBINSON,
Attorneys for Defendant in Error.

Service of this brief acknowledged this the .... day of December, A. D. 1915.

.....,
Attorney for Plaintiff in Error.

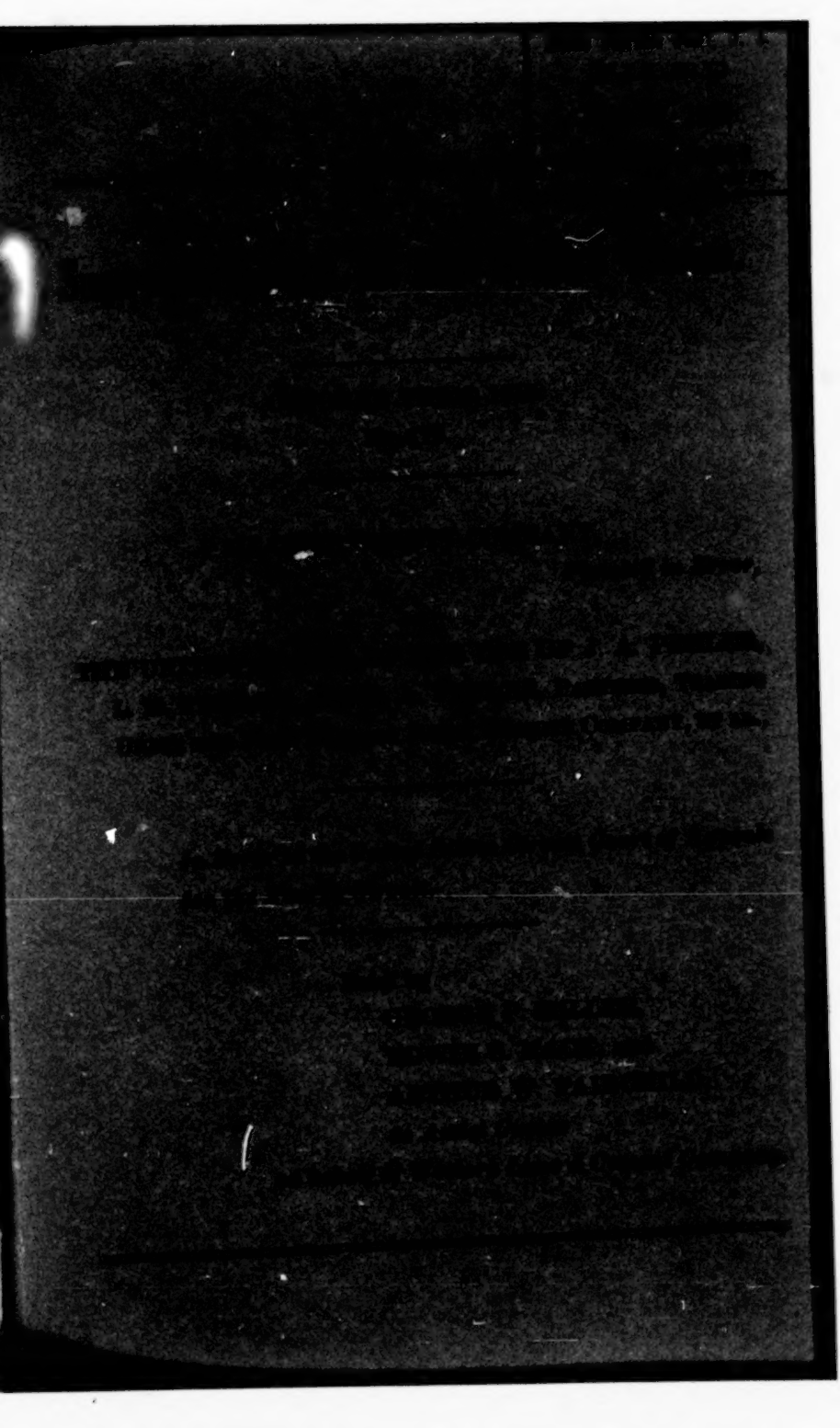

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TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 176.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES TO THE USE OF J. A. PEELER, L. M. PEELER, AND P. A. PEELER, Partners, Trading under the Firm Name of Faith Granite Company, et al.,

In error to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief by

George P. Miller, Edwin S. Mack and Arthur W. Fairchild on behalf of Western Lime & Cement Company as amici curiae.

The Western Lime & Cement Company is interested, as a sub-contractor, who furnished materials used in the construction of the ten main buildings of the Naval Training Station at North Chicago, Illinois, which buildings were constructed under a contract made on the part of the United States by the Navy Department, in a suit brought under the statute here involved. The result in that suit is practically certain to depend upon the holding of this Court as to what constitutes the final settle-

ment with reference to which the time for the commencement of suits on federal building contractors' bonds must be determined. Considerable confusion has arisen in the decisions of the various federal courts on this question, all of which, we believe, will be avoided if the question at issue be considered from all possible viewpoints rather than with reference to the particular situation presented in a single case. We, therefore, respectfully beg leave to submit these views as amici curiae.

This statute is the act of February 24, 1905, U. S. Compiled Statutes (Supp. 1907), and reads as follows:

> "*Bonds of Contractors for public buildings or works; rights of persons furnishing labor and materials; remedies on bonds, and proceedings in actions thereon.*
>
> That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall *promptly make payments to all persons supplying him or them with labor and materials* in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished *labor or materials* used *in the construction or repair* of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the

bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months *from the completion* and *final settlement* of said contract, then the person or persons supplying the contractor with *labor* and *materials* shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, *That* where *suit* is instituted by any of such creditors on the bond of the contractor it *shall not be commenced until after* the *complete performance of said contract and final settlement thereof*, and shall be commenced within one year after *the performance and final settlement of said contract*, and not later; And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and *any*

creditor may file his claim in such action *and be made party* thereto *within one year from the completion of the work under said contract, and not later.* If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability; Provided further, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." (Italics ours.)

As we understand it, the defendant in error contends that there was a settlement on August 26, 1912, either (1) because on that day the Government received from the contractor an agreement to accept the amount proposed by the Government to be paid, or (2) because on that day the Treasury Department finally settled the account so far as the Government was concerned, the Treasury Department, in so doing, exercising its power

and authority to settle and adjust claims and demands against the United States without regard to the question as to what department may have made the contract.

On the other hand we understand that the plaintiff in error contends that there was a final settlement either on September 11, 1912, when the voucher for the sum theretofore fixed upon was issued, or on September 12, 1912, when the receipt of payment was endorsed thereon.

Before a suit may be commenced under this statute there must be both *complete performance* of the contract and *final settlement* of the contract.

United States vs. McCord, 233 U. S., 157.

United States vs. Stannard, 207 Fed., 198, 201.

United States vs. Bailey, 207 Fed., 782.

Stitzer vs. United States, 182 Fed., 513, 518.

United States vs. Mass. Bonding & Ins. Co., 215 Fed., 241.

It is true that there is a distinction between final completion of the work and final settlement under the contract.

The provision relating to completion of the work deserves especial emphasis. That provision is important not alone for the protection of the United States, but for the adequate protection of the persons for whose benefit the bond is required. Every

person who furnishes any material or labor is entitled to its benefits. This does not mean every person who furnishes materials or performs labor in the early stages of the performance of the contract. The man who may have a claim for $2.50 for the last day's work in plastering a piece of wall in order that the contract shall be complete is entitled to the benefit of the bond. So long as anything remains to be done looking toward the completion of the contract and the contractor has not been excused from the doing of that work, there is not a complete performance of the contract or of work under the contract. It undoubtedly is true that even when the work is in a sense physically incomplete there may be a final settlement arrived at by agreement in which further performance shall be waived, but to have that effect the final settlement must be one which terminates the contract. In the case at bar it appears that on August 15, 1912, all work embraced in the contract had been satisfactorily completed. As we shall see *it is of the utmost importance that "final settlement" be given such a construction that in all cases it will have been preceded by final completion.*

I.

Does it Mean Payment?

Of course, there would be a final settlement when payment was made if none had preceded it, and there is room to argue that there can be none prior to final payment.

We shall, therefore, omit any discussion of the question as to whether or not payment constitutes

final settlement, and we shall discuss first the proposition that final settlement, within the meaning of this statute, means adjustment by agreement.

II.

Does it Mean Adjustment by Agreement?

The first rule of construction is that words should be given their ordinary meanings. It is only necessary to define the word "settle". "Settlement" means an adjustment of differences by agreement. It has been said to be:

> "a determination by agreement; * * * an adjustment between persons concerning their dealings or difficulties, whereby a balance is ascertained to be due from one to the other, or an agreement is entered into which terminates their controversy; * * * payment, or accord and satisfaction, or something equivalent to accord and satisfaction, admissible as a defense under the general issue;"
>
> *35 Cyc.*, 1443.

Construction should not be resorted to until ambiguity arises. Words should be accorded their popular meaning wherever possible. Any person interested in a bond given under this statute, having this rule of construction in mind, would assume that whenever he found that the parties had *agreed* upon a settlement, the date of such agreement was the date by which he must be guided in commencing his action. The word "settlement" when relating to a bi-party arrangement of any kind should be held to refer to a bilateral settlement. If this rule of construction be followed, it must be held in this case that there was a final

settlement on the day when the contractor in writing assented to the settlement proposed to him by the Government. Until that time there was no settlement. After that time there remained nothing to be settled.

We respectfully submit as the most logical construction of the statute that indicated in the following abstract from the findings of the learned trial judge in the case at bar:

> "I construe the words 'final settlement' to mean a final adjustment and determination either by contractual agreement of the parties or by proper judicial proceedings of the final results of the operation under the contract, so as to finally determine the balance or result on whichever side it may be." (Transcript p. 49.)

While in this case the court of appeals discussed the proposition covered by the next subdivision of this brief, the real ground of the decision was that there was an adjustment by agreement, a proposition finding support in other decisions.

Illinois Surety Co. vs. United States, 215 Fed., 334; 131 C. C. A., 476.

United States vs. Illinois Surety Co., 226 Fed., 653, 662.

Stitzer vs. United States, 182 Fed., 513.

Of course, if there be any claim that the work is in any sense incomplete, there cannot be a final settlement closing up the entire controversy by an agreement between the parties except one which would involve a waiver of final completion. In that sense of the word it may be true that there can

be a *final settlement by agreement*, an element of which shall be *an agreement to treat the contract as completed, or a waiver of further completion.* These conclusions are arrived at by the application of the ordinary rules of construction.

III.

Does it Mean Merely a Statement of the Government's Position?

Let us now consider whether or not there is any reasonable theory upon which the statute may be given a construction, under which final settlement may be held to be anything other than an adjustment by agreement of the parties. We enter upon this branch of the discussion on the assumption that the statute is so worded as to require a construction and to call for a departure from the cardinal rule requiring that words be given their popular meaning. Proceeding on that assumption, to what would a person interested naturally turn as a definition of "settlement" and what would he assume to be the only definition to be adopted if the ordinary one be rejected? Most persons would be inclined to construe the words "final settlement" to mean, as did the learned trial judge.

If, however, there can be a unilateral settlement, it must be some act which, at least in some sense, results in settling the matter for that party.

If we turn to the statutes relating to claims against the Government, we will find that there is a provision under which the amount to be allowed on a claim is definitely settled and the Government committed to that settlement (at least until

it shall have been overturned by some proper judicial proceeding).

Attention is called to the following statute:

> "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."
>
> *Section 236 R. S.; 3 Stat. L. 366; 7 Fed. Stats. Ann., 362.*

A reading of the discussion of final settlement in *2 Op. Atty. Gen. 625, at pages 629 and 630;* and *13 Op. Atty. Gen. 5, at page 7,* indicates that the term "final settlement" had come to have a meaning under this section.

We also call attention to the following statute:

> "All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the auditors of the Treasury, according to the nature of the contracts; *Provided,* That this section shall not apply to the existing laws in regard to the contingent funds of Congress."
>
> *Section 3743 R. S.; 28 Stat. L. 210; 6 Fed. Stats. Ann., 131.*

Under this act, as formerly framed (July 16, 1798) it was held in *2 Op. Atty. Gen. 518 (1832)* that contracts for bricks and masonry at Fort Monroe ought to have been deposited with the Comptroller, and accounts arising therefrom ought to be adjusted at the Treasury Department, and that until that should be done, the Secretary of War could not be called upon to order payment.

We find the word "settled" used also in Section 271 R. S., which reads as follows:

> "The Comptroller of the Treasury, in any case where, in his opinion, the interests of the Government require it, shall direct any of the auditors forthwith to audit and *settle* any particular account which such auditor is authorized to audit and settle."
>
> (Italics ours.)
>
> *28 Stat. L. 206; 7 Fed. Stats. Ann., 375.*

Section 8 of the Act of July 31, 1894 (28 Stat. L. 162; 7 Fed. Stats. Ann. 384) provides that the balances which may from time to time be certified by the auditors

> "upon the *settlements* of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been *settled*, the head of the executive department * * * to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government: * * *
>
> Any person accepting payment under a *settlement* by an auditor shall be thereby precluded from obtaining a revision of such *settlement* as to any items upon which payment is accepted. * * * When suspended items are finally *settled* a revision may be had as in the case of the original *settlement*. * * *"
>
> (Italics ours.)

Section 23 of this same act *(7 Fed. Stats. Ann. 389)* provides that nothing therein shall be construed to authorize the re-examination and pay-

ment of any account "which has heretofore been disallowed or *settled.*" All through the act in question is found the word "settled" used in connection with the determination by the Treasury Department as to the disposition to be made of the various claims therein referred to.

By *Section 277 R. S.; 17 Stat. L. 287; 7 Fed. Stats. Ann. 377* various auditors of the Treasury Department are assigned to receive and examine accounts accruing in or relative to the other departments.

It is reasonable to assume that Congress intended to fix the time within which the suit might be commenced with reference to some act or date readily and easily ascertainable and fixed and certain in its nature.

If, in the statute under consideration, the words "final settlement" refer to the same thing referred to by the words "settled" and "settlement" used in reference to the settlement and adjustment of claims and demands against the United States in the Department of the Treasury, we have then pointed out to all persons interested the action for which they must be on the alert and the office in which they are to seek for the information. There is fixed, with a reasonable degree of definiteness the thing, or action, which determines the date of final settlement. It is the only reasonable construction to be given to the act if the ordinary rule is not to be followed. These views are well stated by District Judge BOURQUIN of the District of Montana in an opinion to which we beg leave to refer.

United States vs. Bailey, 207 Fed., 782.

The same views were taken by Circuit Judge DODGE in the District Court of Massachusetts on March 28, 1913.

United States vs. Massachusetts Bonding & Insurance Co., 215 Fed., 241.

While the decision of the court of appeals in the case at bar is really based upon the proposition that there was a settlement by agreement, the view is also taken that the same date would be fixed if "final settlement" were defined as above outlined.

If, then, final settlement means an authoritative statement of the Government's position as to the amount due or owing on the one side or the other, it means the settlement and adjustment of all claims by the Treasury Department acting in the exercise of its powers under Section 236 R. S. But, if any work under the contract remains uncompleted, then, in order that such action may constitute final settlement an element thereof must necessarily be an absolute termination of the contract as a matter of right, as for instance under a power to terminate for want of proper prosecution of the work.

Persons for whose benefit this statute is framed have but six months within which to commence suit. If the suit be begun a day before or a day after the period fixed it must be dismissed. Whatever be the decision reached in the case at bar, we respectfully submit that it should be based on a definite conclusion as to the meaning of the words "final settlement." Claimants under these bonds

should not be required to follow everything done in half a dozen different departments and bureaus. To say that it means the date of payment, or date of meeting of the minds of the parties on the basis of an agreed settlement evidenced in some definite manner, either of which involves settlement for both parties, or date of settlement and adjustment of the claim by the Treasury Department, which may in a sense be said to settle the matter so far as the Government is concerned, is to fix a date that may be followed with reasonable certainty. To say anything else is to leave them always in danger of the loss of a valuable right because of the conflicting views as to the information which may be material entertained by various departmental officers from whom information is sought.

Respectfully submitted,

GEORGE P. MILLER,
EDWIN S. MACK,
ARTHUR W. FAIRCHILD.

ILLINOIS SURETY COMPANY *v.* UNITED STATES TO THE USE OF PEELER ET AL., TRADING AS FAITH GRANITE COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 176. Argued January 14, 1916.—Decided February 21, 1916.

Final settlement of a contractor's account within the meaning of the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, is not when the final payment is made, but is the final administrative determination by the proper authority of the amount due; in this case, *held* that a suit by a sub-contractor against the surety commenced six months after date of such determination, but less than six months after payment was not prematurely brought, no action having been brought meanwhile by the United States.

Where the action on the contractor's bond was brought within the proper time, an amendment made after the expiration of such time, which does not set up a new or different cause of action but merely corrects a defective statement, may be allowed. *Texas Cement Co.* v. *McCord*, 233 U. S. 157.

The contested liability of a surety on a contractor's bond is not to be determined in equity; the action under the act of 1894 as amended in 1905 is one at law.

If the surety does not contest, but pays into court the full amount of liability, discharging all liability as provided by the statute, the proceeding is simply one for distribution of a fund in court.

Where a sub-contractor was not one of the original plaintiffs and there was no intervention on its behalf, *held* that a judgment could not be rendered in its favor more than a year after final settlement of the contractor's claim; nor does the fact that one claiming, but not proving such claim, to be its assignee was made a party plaintiff, amount to a sufficient and timely filing of the claim of such a sub-contractor.

215 Fed. Rep. 334, modified and affirmed.

THE facts, which involve the construction of the Materialmen's Acts, of 1894 and 1905, and the rights of sub-contractors thereunder, are stated in the opinion.

Mr. Bynum E. Hinton for plaintiff in error.

Mr. Benjamin E. Pierce and *Mr. D. W. Robinson*, with whom *Mr. John L. Rendleman* was on the brief, for defendants in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought by sub-contractors under the Act of August 13, 1894 (c. 280, 28 Stat. 278), as amended by the Act of February 24, 1905 (c. 778, 33 Stat. 811), in the name of the United States to recover upon a contractor's bond. The contract was for the construction of a post-office building in Aiken, South Carolina (Act of March 30, 1908, c. 228, 35 Stat. 526, 528), and the Illinois Surety Company (plaintiff in error) was the surety. The summons and complaint were filed on March 4, 1913. Motion to dismiss was made on September 22, 1913, upon the ground that the complaint did not allege that there had been a completion and final settlement of the contract between the contractor and the United States; or that there had been such completion and settlement more than six months, and within one year, prior to the commencement of the action.

Another ground for the motion was that the remedy under the statute was in equity. The motion was denied, the court permitting the complaint to be amended so as to allege that the contract was completed in July, 1912; that final settlement was made by the Treasury Department on August 21, 1912; and that no suit had been brought by the United States against the contractor and his surety within the six months' period. The defendant, reserving its objection to the order denying the motion and allowing the amendment, answered. Jury trial was waived by written stipulation and the case was heard by the district judge who found, in substance, the facts to be as follows:

That the building was completed, and on August 21, 1912, the Treasury Department "stated and determined the final balance" to be paid the contractor under the contract at the sum of $3,999.01; that this "adjustment and determination" was communicated to the contractor; that on August 26, 1912, a voucher of that date was prepared by the Department showing the balance, as above stated, to which the contractor appended his signature certifying the amount to be correct, and that on that day there was a definite acceptance by the contractor of the adjustment; that on September 11, 1912, a check for the above-mentioned sum was made out by the disbursing clerk of the Department, payable to the order of the contractor, who thereafter collected it; that upon the request of the relator (the Faith Granite Company) the Secretary of the Treasury, on January 16, 1913, furnished to it a certified copy of the contract and bond and that on the sixth day of March, 1913, . . . the present action was instituted by the filing . . . and by service of summons and complaint on defendant Surety Company." It also appeared that no action had been instituted by the United States upon the bond within the six months allowed by the statute.

The district court gave judgment for amounts found to be due to those for whose benefit the action was brought, and to certain intervenors, and this judgment was affirmed by the Circuit Court of Appeals. 215 Fed. Rep. 334. The contentions presented are: (1) That the action was instituted prematurely; (2) that the amendment of the complaint was improperly allowed; (3) that there was no right of action at law; and (4) that the court erred in giving judgment for the Carolina Electrical Company, one of the sub-contractors.

1. The statute provides, p. 812: "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit . . . be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States . . . against said contractor and his sureties, and to prosecute the same to final judgment and execution; *Provided*, That . . . it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." In *Texas Cement Co.* v. *McCord*,[1] 233 U. S. 157, we said that this act created a new right of action upon terms named; and hence that an action brought by creditors before six months had expired from the time of the 'completion and final settlement of the contract' could not be sustained. In the present case, the plaintiff in error insists that there was no final settlement within the meaning of the statute prior to the issue of the check

[1] The statute is set forth in full in the margin of the opinion in the case cited.

for payment to the contractor on September 11, 1912, and that in this view the action was brought too soon.

It was evidently the purpose of the Act of 1905 to remedy the defect in the Act of 1894 by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety and priority with respect to such demand. *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 538; *United States* v. *Robinson*, 214 Fed. Rep. 38, 39, 40. Accordingly it was provided that if the United States sued upon the bond, the described creditors should be allowed to intervene, and be made parties to the action, but subject "to the priority of the claim and judgment of the United States." And it was only in case the United States did not sue within the specified period that the creditors could bring their action. With this object in view—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (*Bryant* v. *N. Y. Steamfitting Co.*, 235 U. S. 327, 337)—it was natural that the time allowed exclusively for action by the Government should begin to run when the contract had been completed and the Government in its final adjustment and settlement according to established administrative methods had determined what amount, if any, was due. Then the Government would have ascertained the amount of its claim, if it had one, and could bring suit if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment, and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed.

The pivotal words are not 'final payment,' but 'final

settlement' and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. See *United States* v. *Illinois Surety Co.*, 195 Fed. Rep. 306, 309; *United States* v. *Bailey*, 207 Fed. Rep. 782, 784; *United States* v. *Robinson* (C. C. A., Second), *supra; United States* v. *Massachusetts Bonding Co.*, 215 Fed. Rep. 241, 244; *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep. 653, 662. The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. By the Act of September 2, 1789, c. 12 (1 Stat. 65), establishing the Treasury Department, the Comptroller was charged with the duty of examining 'all accounts *settled* by the auditor' (§ 3). And it was made the duty of the auditor to receive 'all public accounts and after examination to certify the balance,' subject to the provision that any person whose account should be so audited might appeal to the Comptroller 'against such *settlement*.' The Act of March 3, 1809, c. 28, § 2 (2 Stat. 536), gave authority to the Comptroller to direct the auditor forthwith "to *audit and settle* any particular account," which he was authorized to audit and settle and "to report such *settlement*" for his revision and final decision. (See Rev. Stat., § 271.) By the Act of March 3, 1817, c. 45, § 2 (3 Stat. 366) it was provided that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Treasury Department." This provision was carried into § 236 of the Revised Statutes. The words 'settled and adjusted' were taken to mean the determination in the Treasury Department for administrative purposes of the state of the account and the amount due. See 2 Op. Atty. Gen. 518; *Id.*, 625, 629, 630. Re-

ferring to this provision, it was said by Mr. Chief Justice Waite in delivering the opinion of the court in *Cooke* v. *United States*, 91 U. S. 389, 399: "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department'; and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority *to settle and adjust, that is to say, to determine upon the validity of, any claim against the government.* He can pay only after the adjustment has been made 'in the Treasury Department' and then upon drafts drawn for that purpose by the treasurer." Again, the Act of July 31, 1894, c. 174 (28 Stat. 162, 206–208), relating to the examination of accounts by auditors, and revisions of accounts, etc., provides, in § 8, that "the balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants or to the Postmaster-General upon the *settlements* of public accounts, shall be final and conclusive upon the Executive Branch of the Government," except that any person whose accounts may have been "*settled*," the head of the Executive Department, etc., to which the account pertains, or the Comptroller of the Treasury, may, within a year obtain a revision in the manner stated; also that "any person accepting payment under a *settlement* by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items from which payment is accepted," and, further, that "when suspended items are *finally settled* a revision may be had as in the case of the original settlement." By the Act of May 28, 1896, c. 252, § 4 (29 Stat. 140, 179), the Secretary of the Treasury was directed to make report annually to Congress of such officers as were found "upon *final settlement* of their accounts" to have been indebted to the Government

and to have failed to pay the amount of their indebtedness into the Treasury.

We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision.

In the present case, the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act of

June 6, 1902, c. 1036, 32 Stat. 310, 326. On August 21, 1912, the Supervising Architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of work on buildings under the control of that Department (Dept. Circ., No. 45, Sept. 12, 1912), is as follows: "The department treats as the date of final settlement mentioned in said acts" (referring to the Acts of 1894 and 1905, *supra*), "the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly."

We conclude that the action was not brought prematurely.

2. With respect to the amendment of the complaint, it is apparent that as there was an existing right of action under the statute at the time the suit was brought, the case was not within the decision in *Texas Cement Co.* v. *McCord*, *supra*. No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations,

and in this there was no error. Rev. Stat., § 954; *Missouri, Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570, 576.

3. It is contended that the right given by the statute to the described creditors is of an equitable nature, and that the court erred in permitting recovery at law. The objection in the present case is merely technical, as the parties stipulated to waive trial by jury and the case was heard and decided by the district judge upon facts about which there is no dispute. The question has not been raised heretofore in this court, but it has been assumed in many cases that the action to be brought under the statute upon the contractor's bond, whether the action were instituted by the United States (*United States* v. *Congress Construction Co.*, 222 U. S. 199) or by creditors in the name of the United States, was an action at law. *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533; *Title Guaranty Co.* v. *Crane Co.*, 219 U. S. 24, 35; *Bryant* v. *N. Y. Steamfitting Co.*, 235 U. S. 327. In *Title Guaranty Co.* v. *Crane Co.*, *supra*, a question arose as to the propriety of allowing a docket fee to each claimant. Section 824 of the Revised Statutes provides for a docket fee of $10 "in cases at law, when judgment is rendered without a jury." The court said: "The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat., § 824. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit." In the circuit and district courts and in the circuit courts of appeals, while it seems that objection has rarely been made, there has been almost complete uniformity in treating the creditors' action under the Act of 1905 as one at law. See *United States* v. *Winkler*, 162 Fed. Rep. 397; *Stilzer* v. *United States* (C. C. A., Third), 182 Fed. Rep. 513; *United States* v. *Boomer* (C. C. A., Eighth), 183 Fed. Rep. 726; *United States* v. *Illinois Surety Co.*, 195 Fed. Rep. 306; *Baker Contract Co.* v.

United States (C. C. A., Fourth), 204 Fed. Rep. 390; *Eberhart* v. *United States* (C. C. A., Eighth), 204 Fed. Rep. 884; *United States* v. *Bailey*, 207 Fed. Rep. 783; *Vermont Marble Co.* v. *National Surety Co.* (C. C. A., Third), 213 Fed. Rep. 429; *United States* v. *Robinson* (C. C. A., Second), 214 Fed. Rep. 38; *United States* v. *Massachusetts Bonding Co.*, 215 U. S. 241; *United States* v. *Emery*, 225 Fed. Rep. 287; *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep. 653. It was expressly held to be an action at law in *United States* v. *Stannard* (D. C., N. D., N. Y.), 207 Fed. Rep. 198, 202. The contrary conclusion was reached in *United States* v. *Wells* (D. C., E. D., Tenn.), 203 Fed. Rep. 146, 147; *Illinois Surety Co.* v. *United States* (C. C. A., Second), 212 Fed. Rep. 136, 139, and *United States* v. *Scheurman* (D. C., Idaho), 218 Fed. Rep. 915, 919. The point was raised on rehearing in *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep., pp. 653, 663, 664, but, as it came too late, it was not decided.

The statute provides that the bond shall have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." In this respect, the provision is substantially the same as that contained in the Act of 1894, and the obligation in favor of the materialmen and laborers has been held to be a distinct obligation. *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 423, 425; *Hill* v. *Am. Surety Co.*, 200 U. S. 197, 201, 202. It is an obligation for the payment of money to the persons described, which they are entitled to enforce. The nature of the obligation is not changed by the fact that there is to be but one action. If the United States brings the action the persons described are entitled to be made parties and "to have their rights and claims adjudicated in such action and judgment rendered

thereon." If the United States does not sue within the time specified, they may bring action on the bond in the name of the United States and "prosecute the same to final judgment and execution." Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action. *Title Guaranty Co.* v. *Crane Co., supra.* The obligation of the surety thus enforced in a single action is a legal obligation to the United States for the use and benefit of the several claimants. We do not regard the requirements that "the claim and judgment of the United States" shall have priority, and that the aggregate recovery shall not exceed the penalty of the bond, as insuperable obstacles to proceeding at law. It is the case of an undertaking for the payment of many claims, not to exceed the specified penalty. If the total amount due exceeds the penalty of the bond, it is provided that "judgment shall be given to each creditor *pro rata* of the amount of the recovery." This, however, merely requires an arithmetical calculation after the different causes of action have been passed upon and the amount due upon each determined. We see no ground upon which the conclusion can be justified that the liability of the surety on its bond is to be determined in equity. The contrary has been the generally accepted and, we think, the correct practice.

It should be added that a different situation would arise if the surety, availing itself of the statutory privilege, should pay into court the full amount of its liability, to wit, the penalty on the bond, for distribution. In that case the legal obligation of the surety would be discharged by the express terms of the statute and the proceeding would be simply for the distribution of a fund in court.

4. The plaintiff in error contends that the court erred in giving judgment in favor of the Carolina Electrical Company. The record shows that among those named as the persons instituting the action was the "Electrical

Engineering and Contracting Company, assignee of Joseph B. Cheshire, Jr., receiver of the Carolina Electrical Company." The complaint set forth that the Carolina Electrical Company (a North Carolina corporation) had furnished to the contractor certain material and labor for which there remained unpaid the sum of $498.69; that on October 4, 1912, Joseph B. Cheshire, Jr., was appointed receiver of that company; and that on March 1, 1913, its claim had been "assigned and transferred for value" to the above-named plaintiff by the receiver, and that the plaintiff was the sole owner of the account and had succeeded to all the rights incident thereto which had belonged to the Carolina Electrical Company. The alleged transfer was denied. Evidence was introduced to show the incorporation, and the appointment of the receiver. The district judge found that the order proved was insufficient to establish the authority of the receiver to assign the claim, but held that the proceeding in the case was a sufficient filing of the claim on behalf of the Carolina Electrical Company. Judgment was awarded in favor of that company with direction that it should be paid "only to such person as may be authorized by law to receive it for said Carolina Electrical Company," and the judgment to this effect was affirmed.

In this, we think the court erred. The Carolina Electrical Company was not one of the plaintiffs and there was no intervention on its behalf. The trial court in its findings sets forth the interventions of certain other parties and states that no more interventions appear to have been filed in the cause. It is true, of course, that the real party in interest who is entitled to enforce the cause of action may be substituted as plaintiff. See *McDonald* v. *Nebraska*, 101 Fed. Rep. 171, 178. But the present case is not one of misnomer, or of a nominal plaintiff for whom the real party in interest is substituted, or indeed of any proper substitution. The plaintiff, the Electrical En-

gineering & Contracting Company was not a nominal party, nor was the action in any sense brought for the benefit of the Carolina Electrical Company. The record shows that it was brought, so far as this claim is concerned, solely for the benefit of the Electrical Engineering & Contracting Company upon the allegation that the claim had been assigned to it for value and that it was the exclusive and beneficial owner. According to the record, the Carolina Electrical Company was not made a party at any stage of the action unless this was accomplished by the decision and the judgment. But at the time of the decision, November 10, 1913, by reason of the express limitation of the statute, it was too late for that company to intervene.

The judgment is modified by striking out the provision in favor of the Carolina Electrical Company, and as thus modified is affirmed.

Judgment affirmed.